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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

GARY W. JUSTICE, PETITIONER

v.

JOHN W. DENNIS, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. MUST AN ARRESTEE, OR IN THE ALTERNATIVE, A PRETRIAL DETAINEE, PROVE THAT A STATE POLICE OFFICER'S USE OF FORCE WAS BOTH INSPIRED BY MALICE OR SADISM AND SO SEVERE BRUTAL AND DEMEANING THAT IT SHOCKS THE CONSCIENCE OF A COURT IN ORDER TO ESTABLISH THAT THE FORCE WAS UNCONSTITUTIONALLY EXCESSIVE AND UNREASONABLE IN A 42 U.S.C. § 1983 CIVIL ACTION?

II. ARE THE PHRASES "INSPIRED BY MALICE AND SADISM" AND "SHOCKS THE CONSCIENCE OF A COURT" IMPERMISSIBLY CONFUSING AND VAGUE WHEN USED IN THE JURY INSTRUCTION?

TABLE OF CONTENTS

PAGE

OPINIONS BELOW.....2

JURISDICTION.....3

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....3

STATEMENT OF THE CASE.....4

A. The Facts.....4

B. Proceedings in the Courts Below.....12

C. Proceedings in the Court of Appeals.....15

REASONS FOR GRANTING THE WRIT.....26

I. THERE IS A DIRECT CONFLICT BETWEEN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE SECOND, SEVENTH AND NINTH CIRCUITS...26

II. THE VAGUENESS OF SUCH PRAISES AS "INSPIRED BY MALICE AND SADISM" AND "SHOCKS THE CONSCIENCE OF A COURT" RENDERS THOSE TERMS SO CONFUSING, WHEN USED IN FEDERAL JURY INSTRUCTION AS TO AMOUNT OT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT, BUT SHOULD BE SETTLED BY THE SUPREME COURT.....43

III. THE OPINION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.....52

CONCLUSION.....62

TABLE OF AUTHORITIES

CASES PAGE

Bell v. Wolfish, 441 U.S. 520.....40, 55, 56, 57, 58, 59, 60, 62

Black v. Stephens, 662 F.2d 181.....37

Block v. Rutherford, 468 U.S. 576..55, 56, 57, 58, 59, 60, 62

Davis v. Forrest, 768 F.2d 257.....38

Fernandez v. Leonard, 784 F.2d 1209.36

Fiacco v. City of Rensselaer, 783 F.2d 319.....27, 37

Foulds v. Corley, 833 F.2d 52.....34

Gilmere v. City of Atlanta, 774 F.2d 1495.....25, 39

Gross v. State, 86 Ind. 581, 117 N.E. 562.....24

Gumz v. Morrissette, 772 F.2d 1395.30, 41

Hall v. Tawney, 621 F.2d 1273...21, 38

Hendrix v. Matlock, 782 F.2d 1273...34

Johnson v. Glick, 481 F.2d 1028, cert.den., 414 U.S. 1033.19, 33, 36, 38, 39, 46, 47

Kennedy v. Mendoza-Martinez, 372 U.S. 144.....57

CASES (CONT'D)

Kidd v. O'Neill, 774 F.2d 1252..16, 25

Lester v. City of Chicago,
830 F.2d 706.....25, 29, 30, 41, 54

McKenzie v. Lamb, 738 F.2d 1005....31,
32, 40

Morgan v. Labiak, 368 F.2d 338..38, 39

Norris v. District of Columbia,
737 F.2d 1148.....36, 46

Pennsylvania v. Mimms, 434 U.S. 106.54

Robins v. Harum, 773 F.2d 1004.....25,
29, 31, 54

Rochin v. California, 342 U.S. 165.20,
20, 36, 37, 39, 43, 44, 45

Smith v. City of Fontana, 818 F.2d
1411 .31, 32, 33, 40

Smith v. Wade, 461 U.S. 30..20, 43, 48

Stevens v. Corbell, 832 F.2d 884....34

Tennessee v. Garner, 471 U.S. 1....16,
25, 32, 40, 52, 53, 55, 59

Terry v. Ohio, 392 U.S. 1.....23, 53

Trujillo v. Goodman, 825 F.2d 1453..39

Waggoner v. Mosti, 792 F.2d 595.....37

Whitley v. Albers, 475 U.S. 312.....35

CASES (CONT'D)

Winston v. Lee, 470 U.S. 753....23, 53

STATUTES

28 U.S.C. § 1254.....3

28 U.S.C. § 1331.....13

28 U.S.C. § 1343.....3, 13

42 U.S.C. § 1983.....I, 3, 13, 19, 20, 38, 43

4th Amendment, U.S. Constitution....3, 15, 16, 17, 23, 24, 28, 29, 30, 31, 32, 37, 38, 39, 40, 41, 52, 53, 54, 55, 61

5th Amendment, U.S. Constitution....3, 18, 22, 26, 27, 28, 37, 41, 53, 55, 61

8th Amendment, U.S. Constitution...35, 40

14th Amendment, U.S. Constitution...3, 15, 18, 27, 37, 55, 61

MISCELLANEOUS

Black's Law Dictionary, 4th Ed.....49

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The petitioner, Gary W. Justice, respectfully prays that the Supreme Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on November 25, 1987.

OPINIONS BELOW

The November 25, 1987 en banc opinion of the United States Courts of the Appeals for the Fourth Circuit is reported at 834 F.2d 380, and is reprinted in the Appendix hereto, p. A-2, infra (hereinafter "App.").

The June 16, 1986 panel opinion of the Court of Appeals is reported at 793 F.2d 573, and is reprinted App. A-49. On September 30, 1986, the Court of Appeals ordered that the decision of the panel be vacated, and set the case for oral argument before the en banc court. App. A-47.

The March 7, 1985 judgment of the United States District Court for the Eastern District of North Carolina (Charles K. McCotter, Jr., Magistrate) has not been reported but is set forth at App. A-84.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were issued on November 25, 1987. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343 as well as the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

The provisions of the above statutes and constitutional amendments are set out in the Appendix hereto, App. A-138-142.

STATEMENT OF THE CASE

A. The Facts

On or about November 19, 1982, Gary W. Justice was arrested on a charge of driving under the influence by North Carolina State Highway Patrolman W. B. Rose. Justice was taken to the North Carolina Highway Patrol Station in Onslow County, North Carolina and given a breathalyzer test. He was then taken to the office of the Onslow County Magistrate where bond was set. Trooper John W. Dennis of the North Carolina State Highway Patrol accompanied Trooper W. B. Rose to the Magistrate's office and subsequently accompanied Rose and Justice to the Onslow County Jail. During the time that these actions were taking place, Justice admitted that he was, at times, loud, obnoxious and used

profane language. Justice denied, however, that he offered any resistance. Trooper Rose and Trooper Dennis testified that upon entering the Onslow County Jail, Justice kicked an empty chair causing it to fall over. Justice denied kicking the chair but testified that he unintentionally bumped into an empty chair. Justice was at times, while in the Onslow County Jail, loud, and used abusive language.

Justice was placed in a small room with cement walls near the booking area of the Onslow County Jail. This room was capable of being locked, but neither John Dennis nor W. B. Rose obtained a key to this room or locked it. They could have obtained the key from the jailer. At this time, and during the entire time which is relevant to the

actions given rise to this lawsuit, Gary W. Justice continuously had his hands cuffed behind him.

While Gary W. Justice was still handcuffed, he walked out of the small room in which Trooper Rose had told him to wait until he could be booked and turned over to the custody of the jailer. When Justice walked out, Trooper Dennis seized Justice by either the throat, according to Justice, or the neck, according to Dennis, and proceeded to apply sufficient pressure to leave visible marks the following morning on the sides of Justice's neck and throat area. While Justice was handcuffed and breathing hard with Dennis holding him by either the neck or throat and applying severe pressure, Justice testified that he was breathing hard.

His air flow was being restricted, and some saliva which was dribbling from his mouth flew through the air and struck John Dennis on the mouth. Dennis believed that Justice intentionally spit on him, although Justice testified this was accidental. Dennis then immediately turned Justice's head away from Dennis and propelled Justice into a cement wall with sufficient force to crack or break Justice's teeth. Immediately after pushing Justice into the cement wall and breaking his teeth, Dennis was handed a can of mace by Officer Gary Dixon of the Jacksonville Police Department who was in the jail booking area along with a number of other law enforcement officers. Dennis immediately sprayed Justice in the face with mace. After shoving Justice into the wall and macing

him, Dennis and Trooper Rose laid Justice down to take off his boots prior to placing him in a cell. Trooper Dennis testified that, at that time, Justice told Trooper Dennis to look at what he had done to his teeth. Trooper Dennis then testified that at that point he apologized to Justice and told him with much regret that he hated to see that his tooth was cracked.

Although Trooper Rose testified that he did not see Dennis push Justice into the cement wall, both Dennis and Justice testified that this happened.

At the time that Justice was pushed into the cement wall, Dennis testified that there was no need for any extreme method of subduing Justice and that Justice was neither attempting to escape nor able to escape from the area where

he was. Dennis further testified the main reason he turned Justice around and pushed Justice toward the wall was because Justice spit on him and he wanted Justice out of his face and did not want him spitting in his face. Dennis further testified that it made him angry when Justice spit on him but that his intent was not to hurt Justice.

Dennis admitted that at the point he pushed Justice into the brick wall, Justice could not have been dangerous to anyone. Dennis further testified, when asked if he was in imminent fear that Justice would physically harm him in any way when he pushed Justice toward the wall, that he could have speculated Justice could have kicked him but did not think that crossed Dennis's mind right then. Rather, it was the fact

that Justice spit in his face which caused Dennis to push Justice into the cement wall. Dennis described his state of mind at this time as anger, frustration and ready to get rid of Justice.

Dennis testified that he used the mace pretty much on instinct because it was handed to him and that he could have still probably controlled Justice without it.

According to Dennis, the North Carolina Highway Patrol is not issued mace and had not been issued mace for several years prior to this incident. At no time during this incident did Dennis call for assistance from other officers, although a number of other officers were present, and Dennis could have gotten assistance from them if he had asked for it.

There is some discrepancy in Dennis's testimony as to whether or not Justice at some point actually kicked Dennis. At one point, Dennis swore that Justice kicked him but that this occurred as he and Trooper Rose were laying Justice down to take off his boots, which was after Justice had been shoved face first into the cement wall and then sprayed with mace. At another point, Dennis indicated that Justice had actually kicked at and made contact with Dennis's shin prior to the time that Justice pushed Dennis into the wall. Justice consistently denied kicking Dennis at all. At all events, by Dennis's own admission, he never pushed Justice into the wall and sprayed him with mace for any reason other than the spitting.

After laying Justice down, although he continued to struggle, Dennis and Trooper Rose had no problem removing his boots and placing him in a cell, according to Dennis.

Justice suffered two broken teeth, soreness of the Adam's apple where Dennis grabbed him by the throat and pain from being sprayed in the face with mace. In a pretrial order, attorneys for Justice and Dennis stipulated that Justice was injured in the jail area of the Onslow County Courthouse. Justice's broken teeth resulted in extensive dental treatment and dental expenses in the sum of Eight Hundred Ninety Dollars ($890.00).

B. Proceedings in the Courts Below

This action was commenced by Gary W. Justice filing a complaint in the

United States District Court for the Eastern District of North Carolina on June 29, 1983, pursuant to 42 U.S.C. § 1983 for violating Justice's constitutional rights due to Dennis's unjustified use of brutal and excessive force against Justice. Subject matter jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343. Dennis filed an answer. This action was tried on March 5, 6 and 7, 1985 by consent of the parties before the Honorable Charles K. McCotter, Jr., United States Magistrate, and a jury. Both parties moved to direct a verdict. Both motions were denied. The jury returned a verdict for Dennis on the issue of liability after the court gave jury instructions to which counsel for Gary W. Justice

objected and which instructions formed the basis of the questions presented in this petition for writ of certiorari. The entire jury instructions were set out at App. A-89.

The specific portion of the jury instruction to which the petitioner objects is as follows:

> Members of the jury, you are instructed to use the following standard for determining the amount of force necessary to make the defendant liable.
>
> The force used by the officer is unconstitutionally excessive if the officer used a means so brutal, demeaning and harmful as literally to shock the conscience of a court.
>
> You must determine whether the force applied caused injury so severe, was so disproportionate to the need presented and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal or inhumane abuse of offical power literally

> shocking to the conscience. App. A-106-107.

Plaintiff also requested a jury instruction for the correct constitutional standard as follows:

> The jury returned a verdict for defendant on March 7, 1985 and judgment was entered thereon. Plaintiff gave notice of appeal to the United States Court of Appeals for the Fourth Circuit, on April 25, 26, 1985.

C. Proceedings in the Court of Appeals

On appeal, Petitioner argued before the Appellate Court, as he had before the trial court that the Fourth Amendment to the United States Constitution prohibiting unreasonable seizures, as made applicable by the Fourteenth Amendment's due process clause, applied to this case. Petitioner argued that the correct standard for liability, upon which the

jury should have been instructed, was one of reasonableness under the totality of the circumstances, citing Tennessee v. Garner, 481 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) and Kidd v. O'Neill, 774 F.2d 1252 (1985). On appeal before the Fourth Circuit, Respondent, for the first time, argued that the Fourth Amendment protections, and did not apply to Petitioner's situation since he had been taken before a magistrate and bond had been set prior to the occurrence of this incident. Petitioner filed a reply brief in which he pointed out that the State of North Carolina had treated Petitioner as an arrestee rather than a pretrial detainee by charging him with resisting arrest under state law for actions relating to this incident. Petitioner further pointed out that even

if the Fourth Amendment protections do not apply, substantive due process required that the jury be instructed on a reasonableness under the totality of the circumstances' standard and that of all events the jury should not have been instructed that Petitioner had to prove that Respondent was motivated by malice or sadism in order to establish liability for violation of his constitutional rights. Petitioner further argued that he should not have had to prove that the conduct shocked the conscience of a court in order to establish liability and the jury should not have been so instructed. Petitioner further argued that he had requested the proper instruction of reasonableness under the totality of circumstances.

Petitioner also argued that the use of language in a jury instruction such as motivation by "malice" and "sadism" and "shocking to the conscience" were confusing and vague. Petitioner pointed out that what a jury considers malice or sadism may be different from a court's interpretation.

On June 6, 1986, a panel of the Court of Appeals, with Judge Hall dissenting, held that Justice was a pretrial detainee and that the source of his constitutional protection against the use of excessive force was grounded in the Fifth and Fourteenth Amendments. The court further held that the challenged jury instruction requiring motivation by malice or sadism was not required in order to establish a constitutional violation. The court

noted that the language was taken from Johnson v. Glick, 481 F.2d 1028, cert. den., 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973). The court further noted that Johnson v. Glick, listed the above language as factors. The court then held Johnson to mean that "proof of malice will elevate the common law causes of action to constitutional courts, but is not required to prove the constitutional court." The panel also held that recklessness, wantonness or gross and inculpable negligence may be sufficient for a 1983 excessive force claim and that proof of bad motive, evil intent or alterior purpose is not required. In addition, the panel opinion held that the "shocks the conscience" instruction given by the trial court in the present case was

flawed. After noting that Smith v. Wade, 461 U.S. 30, 50-51, 103 S.Ct. 1625, 1637-38, 75 L.Ed.2d 632 (1983), suggested a vagueness challenge to an instruction imposing § 1983 liability if the conduct "shocks a sensibility," the court held that if a "shocks the conscience" instruction was given it must be faithful to Rochin and proceeded to require such an instruction made clear that the conscience at issue is that of the community in light of involving societal norms, not that of any particular judge or court. The court further held that by focusing on words such as "brutality," "demeaning," and "literally shocking" without explaining them, the instruction suggested an overly high threshold of liability. The panel reversed and remanded for a new trial. App. A-49.

On September 30, 1986, the Court of Appeals ordered that the decision of the panel be vacated, and set the case for oral argument before the en banc court. App. A-47. On November 25, 1987, the en banc court affirmed the jury instruction given by the lower court in the present case, relying primarily on Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980).[1]

The court further held that although constitutionally excessive force is force that is unreasonable under the circumstances the inquiry must

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[1] Hall involved a substantive due process challenge to corporal punishment in the public schools rather than excessive force by a police officer. Hall contained language like that used in the jury instruction which required proof of inspiration by malice or sadism and conduct shocking to the conscience of a court and did not indicate that these were factors rather than the constitutional standard.

not cease at that point. The jury must also determine if the officer has exceeded the bounds of the privilege which police officers have to use force and that whether motivation by malice and sadism is a principal factor, or is a description of the level of conduct that overcomes the applicable privilege makes little practical difference. The majority decision appears to apply to all excessive force cases rather than to be limited to Fifth Amendment substantive due process protections although the majority opinion does indicate that the Fifth Amendment applies to the present case.

Judge Phillips, in a dissent joined by Chief Judge Winter and Judge Ervin, would have reversed the trial court rather than affirming it. In dissent,

Judge Phillips pointed out that the Fourth Amendment right of a person to be secure in his person against unreasonable seizure was involved in the present case and gave two alternative theories for finding such a right. The first theory is that, without regard to when one technically becomes a pretrial detainee, he does not thereby lose all of his Fourth Amendment rights to be secure in his person against unreasonable searches and seizures citing Winston v. Lee, 470 U.S. 753, 755, 105 S.Ct. 1611, 1614, 84 L.Ed.2d 662 (1985). Judge Phillips said also Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1967), has long settled that a seizure of a person within the Fourth Amendment's meaning is not limited to conduct that constitutes

a technical arrest and encompasses any conduct that has in some way restrained the liberty of the citizen by physical force.

Judge Phillips further points out that even if a technical arrest must be considered to have a duration past the initial point at which it could be said the person is in custody, he would have no trouble in the present case finding such a technical arrest either by employing the notion of rearrest to cover the situation where an arresting officer has to forceably subdue a person already in custody, see e.g., Gross v. State, 86 Ind. 581, 117 N.E. 562 (1917), or holding that an arrest lasts as long as the arresting officer retains custody of the person arrested so that Fourth Amendment protections against

unreasonable uses of force applied throughout that period, citing Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985); see also, Lester v. City of Chicago, 830 F.2d 706, 713 n.7 (7th Cir. 1987). Judge Phillips' dissent further points out that Petitioner need only prove that under the particular circumstances, the force used in subduing him exceeded that which reasonably could have been considered necessary to take him and maintain him in lawful custody, citing Tennessee v. Garner, supra, Kidd v. O'Neill, supra, Lester v. City of Chicago, supra, and Gilmere v. City of Atlanta, 774 F.2d 1495, 1502 (11th Cir. 1985)(en banc). App. A-23.

REASONS FOR GRANTING THE WRIT

I. THERE IS A DIRECT CONFLICT BETWEEN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE SECOND, SEVENTH AND NINTH CIRCUITS.

The Court of Appeals en banc opinion in the present case, App. A-2, clearly indicates that a trial court may instruct a jury that proof of motivation by malice or sadism is necessary to show a violation of unconstitutional rights in excessive force cases where Fifth Amendment substantive due process is implicated. The majority opinion in the present case says that it makes little difference whether this requirement is imposed because it is a principal factor which must be met or whether it must be proven in order to show that some police privilege can only be overcome by proving inspiration by malice or sadism.

The contention that proof of motivation by malice or sadism is necessary to establish liability for violation of substantive due process rights protected by the Fifth and Fourteenth Amendments has been flatly rejected by the United States Court of Appeals for the Second Circuit. In Fiacco v. City of Rensselaer, 783 F.2d 319, 325-326 (2nd Cir. 1986), the court held that even a jury finding that defendant police officers did not act maliciously or wantonly was not sufficient to overturn a jury verdict finding violation of plaintiff's constitutional right to be free from excessive force. Fiacco proceeded both before the trial court and before the Court of Appeals on a Fifth and Fourteenth Amendments due process theory. In Fiacco the jury was

instructed, on the constitutional standard, that although a police officer has the right to use such force as necessary under the circumstances, he may not use force that is unreasonable, unnecessary or violent. Id. at 325.

The majority's en banc opinion assumes, in the present case, that Justice's claim was for violation of rights secured by the Fifth Amendment rather than the Fourth Amendment. App. A-11. Justice, of course, had been arrested by Trooper Rose and taken by Rose and Dennis before a magistrate prior to the time this incident occurred. Justice, however, was still in the custody of Troopers Rose and Dennis and had not been turned over to the custody of the jailer when he was pushed into a brick wall and sprayed

with mace. Both the Ninth and Seventh Circuits have held that for purposes of the Fourth Amendment standards, once a seizure has occurred it continues throughout the time the arrestee is in the company of the arresting officers. Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985); Lester v. City of Chicago, 830 F.2d 706, 713, n. 7 (7th Cir. 1987).[2] The court in Lester specifically held that where Fourth Amendment protections are applicable, an objectively unreasonable seizure violates the Constitution regardless of an officer's good intent and that likewise, an objectively unreasonable

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[2] Footnote 7 in Lester, at 713 points out that when the alleged acts in that case occurred Ms. Lester had not been formally charged and bail had not been set, citing the panel opinion in the present case. This portion of the footnote is dicta in that case.

seizure does not violate the Constitution despite the officer's bad intent. 830 F.2d at 712. To the extent that the majority en banc opinion in the present case applies to Fourth Amendment rights, which is clearly what the court intends, the majority en banc opinion directly conflicts with the Seventh Circuit's opinion in Lester v. City of Chicago, for Lester specifically overrules Gumz v. Morrissette, 772 F.2d 1395 (7th Cir. 1985) and holds that with respect to excessive force cases in violation of the Fourth Amendment, a subjective inquiry into a police officer's motives to determine if he acted with malice and his actions therefore shocked the conscience are not required. 830 F.2d at 712.

With regard to the question of Fourth Amendment protections against unreasonable seizures, the decision of the majority in the present case, App. A-2, further conflicts with applicable decisions of the United States Court of Appeals for the Ninth Circuit. As previously pointed out, Robins v. Harum, supra, holds that these protections apply as long as a person is in the company of the arresting officer. In addition, the Ninth Circuit in McKenzie v. Lamb, 738 F.2d 1005, 1011, has held:

> The reasonableness of force should be analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted. (citation omitted)

In Smith v. City of Fontana, 818 F.2d 1411, 1416 (9th Cir. 1987), the court

followed the decision of this Court in Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), and held that a reasonableness standard for Fourth Amendment violations is required. The court in that case further held that reasonableness should be evaluated in the light of the factors defined in McKenzie v. Lamb, and quoted those factors. 818 F.2d at 1416. Nowhere in its Fourth Amendment analysis did either McKenzie v. Lamb, supra, or Smith v. City of Fontana, supra, even require analysis of inspiration by malice and sadism, much less motivation. Neither case required a "shocks the conscience" test to show a Fourth Amendment violation.

Smith v. City of Fontana, supra, further undertook to analyze substantive

due process claims of the decedent's estate. In that analysis, Smith also used a reasonableness standard, but did quote from Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir. 1987), that factors such as the need for application of force, the relationship between the need and the amount of force used, the extent of injury, and whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm were factors to which courts must look. Even under its focus upon these factors, the court nowhere indicated that proof of inspiration by malice or sadism is a requirement for imposing liability of substantive due process violations.

Only one other circuit, the Fifth, has gone as far as the Fourth Circuit in the present case and required inspiration by malice or sadism in order to establish a constitutional violation. Compare, Hendrix v. Matlock, 782 F.2d 1273 (5th Cir. 1986)(4th Amendment unreasonable seizure in arrest) with Stevens v. Corbell, 832 F.2d 884 (5th Cir. 1987)(excessive force while booking an arrestee into jail). But see, Foulds v. Corley, 833 F.2d 52 (5th Cir. 1987), which rejected a claim that plaintiff must show deputy sheriffs acted with malicious and sadistic intent in subjecting a prisoner to solitary confinement in an extremely cold cell and in forcing the prisoner to sleep on the floor where rats crawled over him.

The court further held that treatment of the prisoner did not arise out of the situation posing significant risk to the rights of inmates and prison staff and thus the prisoner was only required, under the Eighth Amendment, to show that infliction of pain was unnecessary and wanton, distinguishing Whitley v. Albers, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). 833 F.2d at 54, 55.

Every other circuit which has considered the issue has concluded, at least by implication, that inspiration by malice or sadism is at most only a factor to be considered, along with other factors, in determining a constitutional violation but none have required inspiration by malice or sadism

in excessive force cases.[3] There can be no doubt that this issue will persist. The Second Circuit will continue to apply a standard to substantive due process claims that requires only proof that the force used is unreasonable,

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[3] D. C. Circuit: Norris v. District of Columbia, 737 F.2d 1148 (D.C. Cir. 1984), a substantive due process case for excessive force used on a jail inmate. The court adopted a "shocks the conscience" standard, citing Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952). The court went on to allow analysis of the Johnson v. Glick factors, but noted that Judge Friendly in Johnson v. Glick stated no threshold requirement of permanent injuries. The court refused to allow the district court to focus upon one factor, the extent of the injury without considering all factors. Nowhere did the court indicate that inspiration by malice or sadism was necessary in order to establish liability.

First Circuit: In Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986), the court applied to a substantive due process claim the "shocks the conscience" test and also applied the Johnson v. Glick factors, but held that it was not necessary to prove that defendant acted maliciously or

unnecessary or violent and will not require a finding of malice or bad motive. Fiacco v. City of Rensselaer, supra. The Ninth Circuit will continue to apply different standards to Fourth and Fifth Amendment cases involving

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sadistically. With regard to plaintiff's Fourth Amendment claim in that case, the court applied a reasonableness standard, balancing the public interest against the individual's right to personal security.

Third Circuit: In Black v. Stephens, 662 F.2d 181 (3rd Cir. 1981), decided under the Fourteenth Amendment liberty without due process of law, the court held that excessive force is such a conduct that "shocks the conscience" citing Rochin. Nowhere however did the court require proof of inspiration by malice or sadism.

Sixth Circuit: In Waggoner v. Mosti, 792 F.2d 595 (6th Cir. 1986), a case alleging excessive force both during and after arrest, the court approved a jury instruction which required finding that the amount of force used was grossly disproportionate to the need for force under the circumstances and that the amount of force used amounted to an abuse of official power that shocks the conscience. Nowhere did the court require proof of intent to injure or inspiration by malice and sadism.

excessive force which requires a reasonableness test analyzed in the light of factors such as the officer's requirement for safety, the motivation for the arrest, and the extent of injury inflicted in Fourth Amendment cases but

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Eighth Circuit: In Davis v. Forrest, 768 F.2d 257 (8th Cir. 1985), a 1983 action against two police officers for beating plaintiff with a flashlight, the court approved a "shocks the conscience" standard, citing the Fourth Circuit's decision in Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980), and approving an instruction which required the jury to consider the four factors of Johnson v. Glick, but stopped short of requiring proof of inspiration by malice or sadism as does Hall v. Tawney, supra, and the en banc court's majority opinion in the present case.

Tenth Circuit: In Morgan v. Labiak, 368 F.2d 338 (10th Cir. 1966), the court held, in a 1983 action for excessive force after arrest that a person unlawfully beaten by an arresting officer is denied the right of due process of law and further held that the reasonableness of the force used in making an arrest under all the circumstances is a question for the jury, and the standard is the conduct of ordinary prudent men under the existing

will not require a conduct that shocks the conscience of the court or consideration of the Johnson v. Glick factors in Fourth Amendment cases, but will require both in substantive due

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circumstances. In Trujillo v. Goodman, 825 F.2d 1453 (10th Cir. 1987), in contrast to Morgan v. Labiak, supra, the court held that some element of intent is required to show a constitutional violation in an excessive force case because it includes an inquiry into the motives of the state officer. This case, however, would allow such a finding to be made when either the force is inspired by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience or is inspired by malice rather than mere carelessness. Even Trujillo v. Goodman appears to stop somewhat short of the absolute requirement of proof of inspiration by malice or sadism although it does come close to the majority opinion of the en banc court in the present case.

Eleventh Circuit: In Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) (en banc), an excessive force in arrest case, the court applied a "shocks the conscience" test from Rochin v. California, supra, to the substantive due process claims and applied the Johnson v. Glick factors to the substantive due process claims. The court did not require,

process cases. Compare, McKenzie v. Lamb, supra, with Smith v. City of Fontana, supra. The Fourth Circuit will continue to require, in Fourth, Fifth and Eighth Amendment cases, conduct that both shocks the conscience of the court and is specifically inspired by malice

---

however, for a violation of substantive due process that there be a requirement of proof of inspiration by malice or sadism. The court also considered a Fourth Amendment claim and applied the standard of Tennessee v. Garner, supra, to determine if the seizure was unreasonable and required balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion. The court further held that in conducting this balancing test the court should consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted, citing Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 1864, 60 L.Ed.2d 447 (1979).

or sadism in order to establish liability. The Seventh Circuit will continue the reasonableness approach of Lester v. City of Chicago in Fourth Amendment cases involving excessive force but may follow Gumz v. Morrissette in Fifth Amendment cases, and may draw a very technical line between the two.

The other circuits will continue to follow the different variations lying between the Fourth and Fifth Circuits' approaches and the approaches of the Second, Seventh and Ninth Circuits.

The confusion which now reigns in the federal appellate courts as to what is the proper standard to be used under the Fourth or Fifth Amendments to the United States Constitution in excessive force cases will continue to produce a flood of appellate litigation and will

give citizens of the United States, as a practical matter, widely varying constitutional protections against excessive force. Citizens fortunate enough to reside in the areas covered by the Second, Seventh and Ninth Circuits will have much greater protection than those who reside in the areas covered by the Fourth and Fifth Circuits. Thus, this important constitutional question has implications which are extremely broad and sweeping. The only way citizens of the United States can have their constitutional rights fully protected, and the present state of ocnfusion removed, is for the Supreme Court to resolve the conflict that presently exists between the circuits.

II. THE VAGUENESS OF SUCH PHRASES AS "INSPIRED BY MALICE AND SADISM" AND "SHOCKS THE CONSCIENCE OF A COURT" RENDERS THOSE TERMS SO CONFUSING, WHEN USED IN A FEDERAL JURY INSTRUCTION AS TO AMOUNT TO AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT, BUT SHOULD BE SETTLED BY THE SUPREME COURT.

The panel opinion in the present case points out the confusion surrounding the use of phrases such as "shocks the conscience" or "shocks the conscience of a court." 793 F.2d at 577, 578, App. A-63. Judge Ervin notes that the "shocks the conscience" language of Rochin v. California, supra, is of questionable clarity in setting an ascertainable guide for a jury. Judge Ervin further notes that Smith v. Wade, 461 U.S. 30, 50-51, 103 S.Ct. 1625, 1637-38, 75 L.Ed.2d 632 (1983), suggests a vagueness challenge to an instruction imposing § 1983 liability if, inter

alia, the conduct "shocks the sensibilities." Judge Ervin further notes that, to the extent such language invites a jury to infer how a judge would react, the flaw is obvious. As pointed out in n. 5 to the panel opinion, it is impossible to ascertain from the "shocks the conscience" language of the jury instruction in the present case where the jurors thought they were to employ their personal norms, their view of the judge's norms, or their view of general, societal norms of "shocking behavior." App. A-64.

In an effort to resolve this problem, the panel opinion indicates that Rochin, 342 U.S. at 170-172, 72 S.Ct. at 208-210, makes it clear that the conscience at issue is the conscience of the community in light of

involving societal norms, not the conscience of any particular judge or court. The panel opinion further indicates that a "shocks the conscience" standard must be true to this concept in Rochin, and that the instruction in the present case was not.

Certainly "shocks the conscience of a court" is a very vague, confusing phrase, particularly when coupled with other equally vague and confusing phrases in a jury instruction where none of these phrases are defined. Indeed, a jury could conclude from such language that the standard for liability in excessive force cases is an emotional rather than reasonable standard based upon either the individual juror's conscience, the conscience of some particular judge, or possibly even the

emotional reaction which this Court might have.

The inclusion in the present jury charge of language such as "inspired by malice or sadism", together with that already generated by the "shocks the conscience of a court" language makes the charge even more confusing. In Norris v. District of Columbia, 737 F.2d at 1157, Judge Doyle, in his concurring opinion, points out that the inclusion of language in Johnson v. Glick such as "good faith," "malice," and "sadism" is thoroughly confusing. 737 F.2d at 1157 n. 5. Indeed, Judge Doyle, in his concurring opinion, states: "But is it suggested that the consitution condemns the application of force by government when one is justified or the application of excessive force, only in the absence

of good faith and the presence of malice and sadism?" 737 F.2d at 1157 n. 5. Furthermore, Judge Doyle states that only three factors of those set forth in Johnson v. Glick, supra, are the tests of constitutionality in excessive force cases. Those factors are: (1) the need for the application of force; (2) the relationship between the need and the amount of force used; and (3) the extent of the injury inflicted insofar that it is probative of the amount of force used and that it bears on the sum to be awarded as damages. Id. at 1157.

Words such as "malice" and "sadism" are especially capable of being misunderstood by a jury. Indeed, the only understanding a jury would likely have of "inspired by malice or sadism" would be actual malice. Malice, of

course, has a legal definition which may be supplied by recklessness or gross negligence, Smith v. Wade, supra, but with requirement for inspiration of malice coupled with language like "grudge," "ill will," "spite" clearly indicates to jurors that at least hatred, possibly even deep-seeded hatred, must be present to find a constitutional violation.

The use of the word "sadism" in a jury instruction, when it is not defined, is even worse. Sadism carries with it connotations of torture or prolonged agony inflicted to satisfy some sexual desire, although it may also be used to refer to brutality or torture without sexual connotation. Unless the term is defined for a jury, however, there is no knowing how they would

interpret "motivation by sadism." The only definition for "sadism" given in Black's Law Dictionary is "that state of sexual perversion in man in which the sexual inclination manifests itself by the desire to beat, maltreat, humiliate and even kill the person with whom the passion is conceived." Black's Law Dictionary, 4th Ed. (1968), p. 1501. If the preceding is the generally accepted legal definition of "sadism," how can courts possibly expect jurors not to apply it? More significantly, how can jurors possibly apply terms such as "shocks the conscience of a court" and "inspired by malice and sadism" in any sort of consistent, objective manner.

The use of such vague, confusing and emotion-charged terms in a jury instruction can only invite the jury to

decide the case on the basis of each juror's emotional reaction to the evidence offered rather than on any consistent constitutional standard. The result would be to have plaintiffs in excessive force cases have their claims turned, not upon the law, but rather upon the feelings and emotions of the individual jurors without any clear guidance at all.

Clearly, due process requires a consistent constitutional standard applicable to all persons who allege excessive force violations rather than an unduly vague and confusing standard. Even if it did not, this Court, in the exercise of its supervisory power over the lower federal courts, ought not to allow jury instructions which are as vague,

confusing, and emotionally charged as those used in the present case. At a minimum, if such language is used, the lower court should be required to define these terms at least to the extent that Judge Ervin's panel opinion in the present case attempted to do. Petitioner believes, however, that such terms should not be used at all and has consistently objected to their use throughout the proceedings before the trial and appellate courts.

The Supreme Court should resolve this issue and hold that the use of phrases such as "shocks the conscience of a court" and "inspired by malice and sadism" are too vague and confusing to withstand scrutiny when used in a jury charge.

III. THE OPINION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

The en banc majority opinion below, App. A-2, directly conflicts with this Court's decision in Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). In that case, the court held that for Fourth Amendment purposes the standard for liability was an objective standard of reasonable under the totality of the circumstances. Tennessee v. Garner requires a balancing test which requires that the nature and quality of the intrusion on the individual's Fourth Amendment interests be balanced against the importance of the governmental interests alleged to justify the intrusion. 471 U.S. at 8, 105 S.Ct. at 1699, 85 L.Ed.2d at 7. It is difficult to imagine a more direct conflict with an opinion of this Court

than that posed by the majority opinion below which still retains, for Fourth as well as Fifth Amendment purposes, a requirement of proof of inspiration by malice or sadism, coupled with proof of brutality which shocks the conscience of a court. Tennessee v. Garner, supra, contains no such requirements.

Furthermore, as Judge Phillips points out in his dissent to the en banc opinion below, App. A-18, a person does not lose all of his Fourth Amendment rights to be secure in his person against unreasonable searches and seizures when he becomes a pretrial detainee, citing Winston v. Lee, 470 U.S. 753, 755, 105 S.Ct. 1611, 1614, 84 L.Ed.2d 662 (1985).

Judge Phillips further points out that Terry v. Ohio, 392 U.S. 1, 88 S.Ct.

1868, 20 L.Ed.2d 889 (1967), has long since settled that a seizure of a person within the Fourth Amendment's meaning is not limited to a technical arrest, but includes any activity which "'by means of physical force...has in some way restrained the liberty of a citizen,' id. at 19 and n. 16, 88 S.Ct. at 1879 and n. 16." App. A-40-42.

The Supreme Court has implicitly recognized that there may be a succession of seizures in a police-citizen encounter, citing Pennsylvania v. Mimms, 434 U.S. 106, 109, 98 S.Ct. 330, 332, 54 L.Ed.2d 331 (1977); see also id. at 116 n. 2, 98 S.Ct. at 336 n. 2 (Stevens, J., dissenting). Based upon this case, as well as the Ninth Circuit opinion in Robins v. Harum, supra, and the Seventh Circuit opinion in Lester v.

City of Chicago, supra at 713 n. 7, Judge Phillips is of the opinion that Fourth Amendment protections against the unreasonable use of force applies throughout the period during which Gary Justice was in the custody of Troopers Rose and Dennis, and thus the Fourth Amendment protections of Tennessee v. Garner, supra, apply. App. A-19-46.

Even if Petitioner's claim in the present case falls within the substantive due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution to be free of deprivation of liberty without due process of law, the majority en banc opinion below nonetheless conflicts with this Court's decisions in Block v. Rutherford, 468 U.S. 576, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984), and Bell v.

Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). Although Block v. Rutherford and Bell v. Wolfish determine where jail conditions rather than excessive force cases, they clearly established the constitutional standard to be used with regard to the substantive due process rights of pretrial detainees. In Block v. Rutherford, the Court reaffirmed its holding in Bell v. Wolfish that where it has been alleged that a pretrial detainee was deprived of liberty without due process, the dispositive inquiry is whether the challenged condition, practice or policy amounted to punishment, for under the due process clause pretrial detainees may not be punished prior to an adjudication of guilt in accordance with due process of

law. Block v. Rutherford, 468 U.S. at 583, 82 L.Ed.2d at 445, citing Bell v. Wolfish, 441 U.S. at 535, 60 L.Ed.2d 447, 99 S.Ct. 1861. The court in Block v. Rutherford, referring to its decision in Bell v. Wolfish, supra, went on to state:

> Specifically, we observe that '[a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose' id., at 538, 60 L.Ed.2d 447, 99 S.Ct. 1861 (citation omitted). Absent proof of intent to punish, we know that this determination will "generally turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" Ibid. (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 9 L.Ed.2d 644, 83 S.Ct. 554 (1963)). 468 U.S. at 584, 82 L.Ed.2d at 445.

Block v. Rutherford, supra, was a case involving state pretrial detainees while Bell v. Wolfish, supra, was a case involving federal detainees. Both cases, however, clearly show that the proper constitutional standard to be applied in substantive due process cases to pretrial detainees is whether or not the actions of the state officials amount to punishment. Both cases further hold that proof of intent to punish is not necessary in order to find a due process violation and in the absence of such proof of intent to punish, the Court should consider whether an alternative purpose may be assigned to the action and whether the action appears excessive in relation to the alternative purpose assigned to it. Although the wording of this

instruction is somewhat different from the reasonableness under the totality of the circumstances, and the balancing of competing state interests standard of Tennessee v. Garner, supra, the inquiry under the due process clause appears to be very similar to that of Tennessee v. Garner.

It would be irrational to attempt to distinguish Block v. Rutherford, supra, and Bell v. Wolfish, supra, on the grounds that they were condition cases while the present case is excessive force. All of these cases involved pretrial detainees, and it seems beyond question that a pretrial detainee could suffer as much or more punishment from the application of excessive force to his person as he could suffer from jail conditions.

Of course, Block v. Rutherford, supra, and Bell v. Wolfish, supra, warned that with regard to specific restrictions reasonably related to security interests, the Court should ordinarily defer to the expert judgment of prison administrators and officials. See, e.g., Block v. Rutherford, 468 U.S. at 584-585, 82 L.Ed.2d at 446. Of course, such language about deference to prison administrators and officials when devising general regulations relating to security interests should not apply to cases such as the present one where there was no allegation that Onslow County jail officials had any policy, regulation or practice of inflicting physical force on prisoners.

There can be no doubt that the opinion below, requiring conduct which shocks the conscience and which was inspired by malice or sadism to show a substantive due process violation of a pretrial detainee's rights, conflicts with the standard set by this Court for evaluating pretrial detainees' substantive due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. Thus, even if the Court were to determine that Gary Justice had no Fourth Amendment rights implicated by this situation, the Court should nonetheless grant certiorari because the en banc majority opinion below, App. A-2, conflicts with the substantive due process standard

established by this Court in Bell v. Wolfish, supra, and Block v. Rutherford, supra.

CONCLUSION

For these various reasons, the petitiion for certiorari should be granted.

Respectfully submitted.

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87-1422

87 _____

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GARY W. JUSTICE,
Petitioner,
v.

JOHN W. DENNIS,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

En banc Opinion below.....A2

Order Granting Rehearing En banc....A47

Panel Opinion below.....A49

Notice of Judgment of The Fourth Circuit.....A81

Judgment of Trial Court.....A84

Jury Verdict.....A86

Jury Charge.....A89

Statutes and Constitutional Amendments.....A137

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1431

Gary W. Justice,

Appellant,

versus

John W. Dennis, individually and in his official capacity as North Carolina State Highway Patrolman,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. Charles K. McCotter, Jr., Magistrate. (C/A 83-94-CIV-4)

Argued: December 8, 1986 Decided: November 25, 1987

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, SPROUSE, ERVIN, CHAPMAN, WILKINSON, and WILKINS, Circuit Judges, sitting en banc.

James J. Wall, (Barbara von Euler; Legal Services of the Lower Cape Fear on brief) for appellant; Isaac T. Aveery, III, Speical Deputy Attorney General, North Carolina Department of Justice (Lacy H. Thornburg, Attorney General; W. Dale Talbert, Assistant Attorney General on brief) for appellee.

HALL, Circuit Judge:

Gary Wayne Justice, the plaintiff in a civil rights action brought pursuant to 42 U.S.C. §1983, appeals from a judgment entered on a jury verdict in favor of the defendant, John W. Dennis. Justice also appeals the denial by the United States Magistrate of his motion for judgment notwithstanding the verdict ("JNOV"). Finding no error, we affirm.

I.

Justice was arrested on December 19, 1982, by Trooper W. B. Rose of the North Carolina Highway Patrol, who

suspected that he was driving while under the influence of alcohol. Rose transported Justice, first, to the Highway Patrol Office, where a Breathalyzer test, which revealed a high blood alcohol concentration, was administered and, subsequently, to the magistrate's office in the Onslow County Courthouse.

It is undisputed that during this time, Justice engaged in constant verbal abuse of the police officers present as well as active physical resistance. For this reason, Trooper Rose requested that Dennis, a fellow officer, accompany him from the Patrol Headquarters to the magistrate's office to provide additional assistance, if necessary.

After a brief appearance, the magistrate found probable cause for

Justice's arrest and set bond at $150.00. When Rose and Dennis then attempted to move Justice to the booking area, he actively resisted, forcing Rose to push him down a hallway.

In the booking area, Justice was placed in a small unlocked visitor's room to await processing. Despite being ordered to remain in that room, Justice emerged and again confronted the officers. Although his hands were handcuffed behind his back, Justice kicked at both Rose and Dennis and spat in Dennis' face. Dennis admitted at trial that in an effort to regain control, he pushed Justice against the wall of the visitors' room. Justice later claimed that the force of this

push drove his face against the wall and cracked his front teeth.[1]

Justice continued to resist when he was brought back into the booking area. Viewing the struggle, Gary Dixon, an officer at the Jacksonville, North Carolina, Police Department, handed, without request, a can of chemical mace to Trooper Dennis, who sprayed it into Justice's face. The spray ended Justice's resistance and he was placed in a holding cell without further incident. Dennis later conceded that he "could have...probably subdued" Justice without the mace.

[1]There was testimony at trial by Justice's dentist which suggested that Justice's teeth, which had been damaged in an earlier accident, were particularly susceptible to further injury.

Justice subsequently brought a civil rights action against Dennis pursuant to 42 U.S.C. §1983, alleging that the officer's "brutal and excessive force" had deprived him of liberty without due process of law. The parties consented to the jurisdiction of the United States magistrate pursuant to 28 U.S.C. §636(c) and the case came to trial on March 5, 1985. The jury returned a verdict in favor of the defendant and the magistrate denied Justice's motion for JNOV. This appeal followed.

II.

On appeal, Justice contends that the magistrate's instructions to the jury on the issue of constitutionally excessive force misstated the applicable

standard and established an impermissibly high threshold for liability under section 1983. Alternatively, Justice argues that reasonable men could not differ on the question of whether the use of chemical mace on a handcuffed prisoner amounts to constitutionally excessive force. We disagree with both contentions.

At trial, Justice proposed the following instruction as the sole standard for assessing liability:

> The Plaintiff Gary Wayne Justice claims that excessive force was used by Defendant Dennis in connection with his arrest. A person, even if he is being lawfully arrested, has a constitutional right to be free of excessive force. An officer is entitled to use such force as a reasonable person would think is required to take one into custody, and this may include such physical force as is reasonably necessary to subdue a person who is struggling with an officer.

> However, an officer is not allowed to use any force beyond that reasonably necessary to accomplish his lawful purpose. Thus if you find that Defendant used greater force than was reasonably necessary in the circumstances of this case, you must find that the Defendant is liable for a violation of the Plaintiff's constitutional rights.

The court declined to limit its instruction to the jury in that fashion and instead offered a lengthy instruction that included the following language:

> Members of the jury, you are instructed to use the following standard for determining the amount of force necessary to make the defendant liable.
>
> The force used by the officer is unconstitutionally excessive if the officer used a means so brutal, demeaning and harmful as literally to shock the conscience of a court.

> You must determine whether the force applied caused injury so severe, was so disproportinate to the need presented and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal or inhumane abuse of official power literally shocking to the conscience.

Although acknowledging that the magistrate's instruction was taken directly from this Court's opinion in Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980),[2] Justice argues that it was never expected that the formulation would be used to instruct a jury. Rather, Justice contends, the language was

[2]Although Hall involved a substantive due process challenge to corporal punishment in the public schools rather than a true excessive force claim, the standard articulated in Hall was subsequently applied in King v. Blankenship, 636 F.2d 70 (4th Cir. 1980). There can be no question that King, which dealt with allegations of impropoer conduct by prison officials, was an excessive force case.

intended to be utilized by a trial court in deciding whether the jurisdictional requirements of a section 1983 action had been established and as a basis for ruling on motions to dismiss, for summary judgment and for a directed verdict. We are not persuaded by appellant's effort to restrict the effect of our prior decisions.

Courts, including our own, have experienced some difficulty in defining the scope of liability for excessive force as a constitutional tort under section 1983. See Kidd v. O'Neil, 774 F.2d 1252, 1253-54 (4th Cir. 1985). The dilemma has been complicated by the fact that claims of excessive force may arise in the context of the fourth, eighth, or as in this instance, the fifth amendment. Subtle efforts at

distinction are, therefore, common in cases in this area.

There are, nevertheless, certain basic principles in section 1983 jurisprudence as it relates to claims of excessive force that are beyond question. Whether the factual circumstances involve an arrestee, a pretrial detainee or a prisoner, it is clear that the agents of the state are permitted to exercise a certain degree of force in order to protect the interests of society. While liability may be assessed under section 1983 when the limits of privileged force are exceeded, the threshold for that liability must be higher than that set for a normal tort action. To allow otherwise would offend the Supreme Court's repeated determination that the

due process clause is not intended to superimpose a "font of tort law" upon whatever systems may already be administered by the state. Daniels v. Williams, 106 S.Ct. 662, 666, quoting Paul v. Davis, 424 U.S. 693, 701 (1976).

We accept without question Justice's basic contention that constitutionally excessive force is force that is unreasonable under the circumstances.[3] The jury's inquiry is fact-based and must consider a number of factors, including "the need for the application of the force;...the relationship between the need for the

[3]We note that the instructions given the jury in this case expressly include a statement to that effect.

force and the amount of force used;...[and] the extent of injury inflicted." Bailey v. Turner, 736 F.2d 963, 970 (4th Cir. 1984).

The inquiry must not, however, cease at that point. The jury must also determine if the state actor has exceeded the bounds of privilege. An instruction such as the one articulated in Bailey that directs the jury to consider whether the force "shocks the conscience" and appears to have been applied "maliciously and sadistically for the purpose of causing harm" is a rational, useful and widely-accepted method of focusing that inquiry. Whether the instruction is designated as a principal factor for consideration, as indicated in Bailey, or as a description of the level of conduct that overcomes

the applicable privilege, as suggested in Kidd, makes little practical differnce. Under either rationale the jury must include the formulation in its deliberations. Certainly, it strains credulity to suggest that the jury should not consider these questions when the Supreme Court has recently held that the issue of liability for excessive force in at least one context turns on those factors. See Whitley v. Albers, ___ U.S. _____, 106 S.Ct. 1078, 1085 (1986).[4]

[4]Although Whitley dealt with an excessive force claim arising under the eighth amendment, we perceive no meaningful distinction between the scope of the jury's inquiry in that situation and in a case involving an allegation of excessive force violating the fifth amendment rights of a pretrial detainee. In both circumstances, the
[4] (Cont.)jury must determine if the level of force used was so unreasonable as to exceed the privilege accorded the agents of the state who have been

We do not suggest that the instructions given at Justice's trial were ideal. They were admittedly rambling and unnecessarily repetitive. Certainly more precise and tightly structured instructions resembling those approved in Bailey would have been preferred. The question is not, however, whether better instructions were possible, but whether the instructions "taken as a whole, fairly and adequately state[d] the pertinent legal principles involved." Chavis v. Finnlines Ltd. O/Y,, 576 F.2d 1072 (4th Cir. 1978). We conclude that they did. To the extent that any of our previous decisions, including Kidd, hold

to the contrary, they are expressly overruled.

III.

We also reject as meritless Justice's contention that reasonable men could not differ regarding whether the use of mace on a handcuffed prisoner was constitutionally excessive force. In Bailey, we determined that the use of mace on an unruly prison inmate was not per se unconstitutional. 736 F.2d at 970. The question of liability turns upon the circumstances in which the mace was used.

In this instance, Justice, although handcuffed, was under the influence of alcohol and obviously capable of strenuous physical resistance. We do not believe that a rational jury was

precluded from finding that the use of mace in these circumstances amounted to a reasonable effort to regain control over a violent and agitated arrestee.

IV.

For the foregoing reasons, the judgment entered pursuant to the jury's verdict is affirmed.

AFFIRMED

PHILLIPS, Circuit Judge, dissenting:

The jury instruction imposing the "substantive due process" standard for assessing Justice's "excessive force" claim was error requiring remand for a new trial. That standard was wholly inapposite to Justice's claim, which as pleaded and presented, was one for violation of fourth amendment rights.

I.

The critical point is precisely that Justice's §1983 claim, properly assessed, was one invoking fourth amendment protection against unreasonable seizures of the person, rather than, as the majority has simply assumed without analysis, that of a pretrial detainee invoking only the direct protections of the fourteenth amendment against deprivations of liberty without due process. As doctrine has developed, that of course can make a great conceptual and practical difference.

If the claim was solely one of a deprivation of liberty without due process, Justice must prove a violation of either the procedural or

"substantive" rights[5] directly secured by the fourteenth amendment. Either, on current doctrine, would present very difficult problems of proof. The almost certain availability of an adequate state post-deprivation civil remedy (typically a personal injury tort

[5]While questions continue to be raised about the existence of any "substantive" component in the due process clauses, see, e.g., Gumz v. Morrissette, 772 F.2d 1395, 1405-06 (7th Cir. 1985) Easterbrook, J., concurring), the Supreme Court plainly continues to recognize that there is, and that it stands as an ultimate barrier against sufficiently abusive exercises of state authority which cause bodily harm. See, e.g. Whitley v. Albers, 106 S.Ct. 1078, 1088 (1986) (substantive due process recognized as congruent source of constitutional protection for convicted prisoners); See also Daniels v. Williams, 106 S.Ct. 662, 665 (1986) ("Due Process Clause...bar[s] certain government actions regardless of the fairness of the procedures used to implement them.")

action)[6] would defeat a procedural due process claim, even if a deprivation of liberty by excessive force were provable. See Ingraham v. Wright, 430 U.S. 651 (1975). Proof of a "substantive due process" violation, though not precluded by the availability of state post-deprivation remedies, would require evidence of a degree of harm and culpability on the defendant's

[6]This assumes that the existence of a state sovereign immunity defense would not make such a tort remedy constitutionally inadequate, a point not yet decided by the Supreme Court, see Daniels v. Williams, 106 S.Ct. 662, 666 n.1 (1986).

part sufficiently high that it would be very difficult to establish,[7] even though an objectively excessive use of force were provable.

On the other hand, if Justice's claim was one properly invoking the fourth amendment right to be "secure in

[7]While the exact nature of the "substantive due process" that protects bodily integrity has not ever been defined with precision by the Supreme Court, the Court has now apparently endorsed the formulation derived from Rochin v. California, 342 U.S. 165, 172 (1952), which embodies as its central element the requirement that the challenged conduct "shocks the conscience," see Whitley, 106 S.Ct. at 1088; cf. Gumz v. Morrissette, 772 F.2d at 1406 (Easterbrook, J., concurring) (propriety of submitting "shocks the conscience" issue to triers-of-fact questioned); Kidd v. O'Neil, 774 F.2d 1252, 1260-61 n. 14 (4th Cir. 1985) (suggesting that in adjudicating substantive due process claims of excessive force, objective excessiveness should be treated as issue of fact; further issue whether so excessive as to be "shocking to the conscience," as question of constitutional law for court).

[his] person[ ]...against unreasonable seizure[ ]...,"it was much more easily established. Justice need only prove that under the particular circumstances, the force used in subduing him exceeded that which reasonably could have been considered necessary to take and maintain him in lawful custody. Tennessee v. Garner, 471 U.S. 1, 8 (1986); Kidd v. O'Neill, 774 F.2d 1252, 1256 (4th Cir. 1985); Lester v. City of Chicago, No. 86-2008, slip op. at 9-10 (7th Cir. Sept. 17, 1987); Gilmere v. City of Atlanta, 774 F.2d 1495, 1502 (11th Cir. 1985) (en banc). Critically, the assessment of reasonableness, hence of excessiveness, under a fourth

amendment §1983 claim is wholly objective;[8] the fourth amendment's protection is against "unreasonable" seizures, without regard to any specific degree of injury or to the state actor's

[8]Section 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right," Daniels v. Williams, 106 S.Ct. at 664.

specific intent, purpose, or motive.[9] Scott v. United States, 436 U.S. 128, 137-38 (1978); Kidd, 774 F.2d at 1255-56; Lester v. City of Chicago, slip op. at 11; but see Jamieson v. Shaw, 772 F.2d 1206, 1210-11 (5th Cir. 1985) (suggesting that culpable motive is essential to proof of excessive force

[9]As the Seventh Circuit has recently pointed out, though the fourth amendment standard does not contain any requirement of a culpable state of mind nor any threshold degree of severity of injury, this does not mean that "every push and shove an officer makes during an arrest will subject the officer to 1983 liability." Lester v. City of Chicago, slip op. at 12. This is so because even an objective inquiry into "reasonableness under all the circumstances" must take into account in the officer's behalf exigencies that may justify particular degrees of injury and explain the temporary suspension of cold rationality in assessing need. Gumz v. Morrissette, 772 F.2d at 1406 (Eaterbrook, J., concurring) (under the reasonableness standard, "the more exigent the circumstances, the more police can do").

claim under fourth amendment).

To the contrary, proof of a violation of procedural due process requires proof of at least grossly negligent conduct, Daniels v. Williams, 106 S.Ct. at 664-67 (procedural due process claim by convicted inmate in connection with personal injury received in prison), while proof of a substantive due process violation requires proof of an even higher degree of culpability involving malice or wantonness, see Whitley v. Albers, 106 S.Ct. at 1088 (equating substantive due process and cruel and unusual standards in considering convicted inmate's personal injury claim).

II.

Whether Justice's claim here is properly considered one for violation of

fourth amendment or substantive due process rights is therefore dispositive of the question whether the challenged instruction was erroneous. The record and the authorities clearly demonstrate that the claim as pleaded, tried, and submitted to the jury was one properly invoking fourth amendment rights. The instruction was therefore erroneous, and its resulting prejudice obvious.

The specific legal claim alleged in Justice's complaint was that Dennis' assault had "depriv[ed] Plaintiff of his liberty without due process of law in violation of the Fourteenth Amendment...and...§1983." No other specific source of constitutional right

was identified in the pleading.[10]

The complaint then identified the specific bodily injury on which the §1983 claim was based as that inflicted by Dennis "as he [Justice] was leaving the Magistrate's office," that is, immediately after probable cause had been found and bail set. The evidence at trial then indisputably established that this event happened while Justice was still in the custody of the arresting officer, Dennis, and before

[10]To the extent the nature of the claim is technically constrained by this pleading, the complaint clearly comprehends, as notice pleading, a fourth amendment claim. "[T]he Due Process Clause of the Fourteenth Amendment...is the source of three different kinds of constitutional protection. First, it incorporates specific protections defined in the Bill of Rights...[including] the guarantees in the Fourth...Amendment[ ]." Daniels v. Williams, 106 S.Ct. 677, 677-78 (Stevens, J., concurring).

routine booking and inventorying processes incident to transfer of his custody to local jail officials had occurred.

The record does not indicate that the question of the specific constitutional right being invoked was ever directly addressed by the parties or the district court before the case was submitted to the jury. So far as appears, no consideration was ever given to the possibility that a procedural due process claim might be in the case. Neither was "substantive due process" directly suggested as the source of claimed right. Rather, every indication is that throughout the trial both parties and the court considered and acted on the understanding that the claim was one asserting the use of

excessive force incident to an arrest, hence quintessentially one invoking fourth amendment protections.

Thus, Justice requested the following instruction, perfectly compatible with the fourth amendment right that was soon to be expressly confirmed in Tennessee v. Garner:

> The Plaintiff Gary Wayne Justice claims that excessive force was used by Defendant Dennis in connection with his arrest. A person, even if he is being lawfully arrested, has a constitutional right to be free of excessive force. An officer is entitled to use such force as a reasonable person would think is required to take one into custody, and this may include such physical force as is reasonably necessary to subdue a person who is struggling with an officer. However, an officer is not allowed to use any force beyond that reasonably necessary to accomplish his lawful purpose. Thus if you find that Defendant used greater force

> than was reasonably necessary in the circumstances of this case, you must find that the Defendant is liable for a violation of the Plaintiff's constitutional rights.

The district court declined to give this instruction and instead gave the expansive one extenxsively discussed in both the superseded panel opinion and the en banc majority opinion. As there indicated, in critical part that instruction required Justice to prove that Dennis' use of force was "malicious," "sadistic," "inhumane," "shocking to the conscience"," etc. This is obviously the "substantive due process" standard derived ultimately from Judge Friendly's influential formulation in the pretrial detainee case, Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), and recognized by this court as relevant in assessing a

comparable subtantive due process claim of "excessive paddling" by a public school student in Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980). But in other parts of its extended instructions, the district court posited a much less stringent standard of simple objective unreasonableness, which it actually identified as being appropriate to a claim of excessive force in effecting and maintaining an arrest. Thus, for example, the court quite properly instructed that

> [E]very citizen has the constitutional right not to be subjected to unreasonable force upon his person while being arrested by a law enforcement officer, even though such arrest is otherwise made in accordance with due process of law.

> On the other hand, in making a lawful arrest, an officer has the right to use such force as is necessary under the circumstances to

effect the arrest. Not every use of force by a law enforcement officer amounts to a deprivation of rights, privileges or immunities secured or protected by the Constitution or laws of the United States.

Whether or not the force used in making an arrest was unnecessary, unreasonable or violent is an issue to be determined in the light of all of the surrounding circumstances, on the basis of that degree of force a reasonable and prudent officer would have applied in effecting the arrest under the circumstances disclosed in this case.

...

The mere fact that the evidence in the case may establish some physical contact between the defendant and the plaintiff during the course of the arrest and processing which resulted in personal injury to the plaintiff is not proof that the defendant acted beyond his lawful authority under state law.

...

The reasonableness or excessiveness of the force used to effect an arrest must be considered in light of the circumstances as they appeared to the officer at the time.

...

If the person being processed resists, obstructs or delays the processing, a highway patrolman may use sufficient force to overcome the resister.

If the resister attempts to inflict serious bodily injury on the trooper the trooper may resort to extreme measures to avoid serious injury and to accomplish the arrest and to prevent the escape.

It is therefore clear that the case was submitted to the jury as one specifically implicating fourth amendment protections incident to the ongoing process of "arrest." Significantly, neither party objected to the district court's obvious assumption, as expressed in the instruction, that this was so. The only specific objection registered was Justice's objection to the court's instruction that to prove excessive force in this

context, Justice must prove that it was "malicious," "sadistic," "shocking to the conscience," etc., that is, a use of force meeting the "substantive due process" standard.

From all this, it is plain that if, as the district court obviously assumed, Justice's claim was properly to be treated as one invoking fourth amendment rights incident to arrest, that portion of the court's instruction which imported the substantive due process standard was prejudicially erroneous. That assumption was only

questioned by the defendant for the first time on this appeal.[11]

[11]It is obvious that considerable uncertainty about the exact source of constitutional protection existed on all fronts in the district court. Justice was certainly no exception. In his motion for Judgment n.o.v., he claimed the protection of the eighth amendment in addition to that of the fourteenth amendment's due process clause as originally pleaded. J.A. 377. The eighth amendment is, of course, not implicated in a pre-conviction setting. See Ingraham v. Wright, 430 U.S. at 664-71.

Given the tortured evolution of doctrine in this realm, the general confusion is understandable and obviously should not prevent this court's assessment of the claim in its most appropriate constitutional dimension. See Lester v. City of Chicago, No. 86-2008 (7th Cir. Sept. 17, 1987), in which the Seventh Circuit, partially overruling its quite recent earlier decision in Gumz v. Morrissette, 772 F.2d 1395 (7th Cir. 1985), has now held, in an obvious attempt to reduce confusion, that "Fourth Amendment standards govern all excessive force in arrest claims," without regard, presumably, to how a claimant chooses to label the claim. Id. at 13. There is no question that Justice has now properly presented the fourth amendment issue to this court on his appeal, See

Tennessee v. Garner, confirming the objective reasonableness test as controlling in fourth amendment claims, was decided by the Supreme Court while this appeal was pending. Confronted with that decision, Dennis has predictably now sought to avoid its force by asserting that Justice's claim should not be considered one under the fourth amendment, but as one invoking only substantive due process rights, so that the instruction was correct. Specifically, the contention is

apparently that because Justice's arrest had been completed when the challenged conduct occurred, he was then a pretrial detainee entitled only to the substantive protections of his liberty interest directly provided by the due process clause.

As earlier indicated, the en banc majority opinion has now simply accepted that contention as the threshold premise for its decision approving the substantive due process instruction. With all respect, this is simply wrong as a general proposition and as particularly applied here.

Though the contention is not elaborated by Dennis, nor discussed

by the majority, it presumably rests on two interrelated notions. First, that all fourth amendment rights cease once an arrested person has become a "pretrial detainee." Second, that in any event the specific protection against unreasonable seizure of the person is narrowly confined to the act of arrest, and that this act is completed when probable cause to detain for trial has been judicially found.

The first notion is flatly wrong. Without regard to when one technically becomes a pretrial detainee, it is settled that he does not thereby lose all his fourth amendment rights to be secure in his person against unreasonble searches

and seizures, nothwithstanding that he may also then be entitled to the concurrent protections afforded by the due process clause to his congruent liberty interest in bodily security. See Winston v. Lee, 470 U.S. 753, 755 (1985) (subjecting state pretrial detainee to forced surgical procedure would violate his "right to be secure in his person guaranteed by Fourth Amendment").

The second notion, that seizure of the person relates only to the event of "arrest," and that arrest ends when probable cause is found, is equally wrong - in both its aspects.

Most critically, and sufficient to dispose of the matter, Terry v. Ohio, 392 U.S. 1 (1967), has long

since settled that a "seizure" of the person within the fourth amendment's meaning is not limited to conduct that constitutes a "technical arrest," and instead encompasses any conduct that "by means of physical force...has in some way restrained the liberty of a citizen," Id. at 19 & n.16. It would be a strange doctrinal twist indeed that treated as "seizures" the limited intrusions, without any use of physical force, that are routinely now considered "Terry stops," but did not treat as a "seizure" the direct use of physical force in subduing a person in custody just because his "arrest" had already been effected. I am satisfied that it is a twist not

present in controlling fourth amendment doctrine. Rather, it seems obvious to me that within Terry's analysis any application of physical force to a citizen which has the effect of disabling him physically to any extent is a "restraint on his liberty," leaving only the question of its reasonableness.

Furthermore, if somehow it were necessary to find that a use of force occurred during an "arrest" in order to consider it a "seizure," I would have no difficulty in doing so here. Even a technical arrest" must

be considered to have a duration past the initial point at which it could be said "this person is effectively in custody." Indeed the law, accommodating the realities, has at times employed the notion of "rearrest" to cover the situation where an arresting officer has to forcibly subdue a person already arrested to keep him in custody. See, e.g., Gross v. State, 117 N.E. 562 (Ind. 1917). And, nearer the constitutional question, the Supreme Court has implicitly recognized that in the course of a police-citizen encounter, there may be a succession of "seizures." See Pennslyvania v. Minns, 434 U.S. 106, 109 (1977); see also id. at 116 n.2 (Stevens, J., dissenting). On this practical view

of the matter, an "arrest," if it be important to give it a duration, lasts as long as the arresting officer retains custody of the person arrested, so that fourth amendment protections against unreasonable uses of force clearly apply throughout that period. Robins v. Hurum, 773 F.2d 1004, 1010 (9th Cir. 1985); see also Lester v. Cith of Chicago, slip op. at 14 n.7.

In our case, as indicated, the arresting officer still had Justice in his custody when the challenged

force was applied by that officer.[12] Therefore, though I think it not necessary to find the "arrest" continued at this point in order to consider that the use of force was a "seizure," this supplies an alternative basis for holding that fourth amendment protections applied.

[12]The intervention of the magistrate's probable cause determination before this event does not, on this view, affect the continuance of fourth amendment protections against unreasonable "seizures." That judicial act does mark the end of the fourth amendment's specific protection against unreasonably prolonged detentions by arresting officers on no more than their own probable cause determinations, see Gerstein v. Pugh, 420 U.S. 103, 114 (1975), but, as Bell v. Wolfish, 441 U.S. 520, 545-46 (1979), has plainly held, it does not mark the end of all fourth amendment protections.

III

For these reasons, Justice was entitled to an unadorned objective reasonableness instruction appropriate to his fourth amendment claim. Having properly requested such an instruction and objected to the district court's patently erroneous instruction imposing a substantive due process standard, he is entitled to a new trial under proper instructions.

I therefore dissent.

I am authorized to say that Chief Judge Winter and Judge Ervin join in this opinion.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-1431

Gary W. Justice,

Appellant

,

versus

John W. Dennis, etc.,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. Charles K. McCotter, Jr. Magistrate

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The appellee's petition for rehearing and suggestion for rehearing en banc were submitted to this Court. In a requested poll of the Court, Judges Russell, Widener, Hall, Sprouse, Chapman, Wilkinson, and Wilkins voted to rehear the case en banc; and Judges Winter, Phillips, Murnaghan, and Ervin

voted against rehearing the case en banc. A majority of judges having voted to grant rehearing en banc.

IT IS ORDERED that rehearing en banc is granted.

IT IS FURTHER ORDERED that this case shall be calendared for argument at the December 1986 session of Court.

Entered at the direction of Judge Ervin.

For the Court,

JOHN M GREACEN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1431

Gary W. Justice,

Appellant,

versus

John W. Dennis, individually and in his official capacity as North Carolina State Highway Patrolman,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. Charles K. McCotter, Jr., Magistrate. (C/A 83-94-CIV-4)

Argued: December 4, 1986

Decided: June 16, 1986

Before HALL, and ERVIN, Circuit Judges, and SWYGERT, Senior Circuit Judge of the Seventh Circuit, sitting by designation.

James J. Wall, (Barbara von Euler; Legal Services of the Lower Cape Fear on brief) for appellant; Isaac T. Aveery, III, Speical Deputy Attorney General, North Carolina Department of Justice (Lacy H. Thornburg, Attorney General; W. Dale Talbert, Assistant Attorney General on brief) for appellee.

ERVIN, Circuit Judge:

Gary Wayne Justice seeks a new trial on his claim that North Carolina State Highway Patrol Trooper John W. Dennis used unconstitutionally excessive force while Justice was detained in the Onslow County Courthouse jail. Although we are not certain that the force exceeded constitutioanl limits, we believe that the jury was instructed to test Dennis' conduct against a standard overly favorable to the trooper. We therefore reverse and remand for a new trial.

I.

In the early morning hours of December 19, 1982, Trooper W. B. Rose arrested Justice for driving while impaired. See N.C.Gen.Stat. §20-138.1 (1983). After a breathalyzer test indicated that Justice was legally intoxicated, Rose prepared to take Justice to a magistrate's office in the Onslow County Courthouse. Because Justice was verbally abusive and physically obstreperous, Rose asked the appellee, Dennis, to follow him to the magistrate's office. Dennis complied.

The magistrate found probable cause for Justice's arrest and set bond at $150.00. The troopers then escorted Justice, who planted his feet to resist the move, to the courthouse booking area. As he entered the booking area,

which contained several other people, Justice kicked a chair across the room. Dennis and Rose then moved Justice into a small visitors' room off the booking area. The door to that room was not locked.

When Justice attempted to wander out of the visitors' room, the incidents forming the basis for this lawsuit occurred. Justice unsuccessfully kicked at Dennis and Rose and spat on Dennis. In response to the spitting, Dennis pushed Justice toward the corner of the

visitors' room, which had cement walls.[1] Justice hit his head on the cement, either through the force of Dennis' push or in an attempt to maneuver away from the wall. Justice then smiled and told Dennis that his teeth had been cracked in the scuffle.[2]

Justice continued to struggle when Dennis and Rose moved him back into the booking area. A city police officer present in the booking area volunteered mace, which Dennis sprayed in Justice's

[1]Rose testified that he, not Dennis, pushed Justice back into the visitors' room. However, Dennis testified that Rose's recollection was incorrect. The recollections of Rose and Dennis are also inconsistent on a number of other details. For purposes of this statement of facts, Dennis' recollection has been adopted.

[2]Justice's dentist subsequently repaired the cracked teeth. He testified that because of a prior accident, Justice's teeth might have been susceptible to injury at unusually low levels of pressure.

face. At trial, Dennis admitted that he used the mace "on instinct pretty much. Because it was handed to me. If it had not been handed to me, I could have, of course, still probably subdued...controlled Gary Wayne without it." After the macing, Justice's wait for bail to be posted passed without incident.

Justice sued Dennis under the Civil Rights Act, 42 U.S.C. §1983 (1982), alleging that the pushing, teeth cracking, and macing violated his due process rights under the fourteenth amendment. After three days of testimony, the court gave the jury the following instruction, among others.

> Members of the jury, you are instructed to use the following standard for determining the amount of force

> necessary to make the defendant liable.
>
> The force used by the officer is unconstitutionally excessive if the officer used a means so brutal, demeaning and harmful as literally to shock the conscience of a court.
>
> You must determine whether the force applied caused injury so severe, was so disproportionate to the need presented and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal or inhumane abuse of official power literally shocking to the conscience.

The jury returned a verdict for Dennis, which the court refused to overturn on Justice's motion for a judgment nothwithstanding the verdict. Justice now appeals, arguing that the instruction set an unconstitutionally high threshold for imposing liability on Dennis.

II.

The instruction was patterned very closely after this court's language in Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980), a section 1983 case involving excessive discipline in a grade school. Verbatim repetition of the language of a previous decision, however, does not guarantee that a jury instruction properly states the standard governing the case at bar. See Kent v. Smith, 404 F.2d 241, 244 (2d Cir. 1968); 9 C. Wright & A. Miller, Federal Practice and Procedure §2556, at 658 (1971). This court noted in Kidd v. O'Neil, 774 F.2d 1252 (4th Cir. 1985), that the terms used in Hall and in other, similar cases are merely "descriptive of state agent conduct and are therefore not the substantive tests

of deprivation of constitutional right in the different factual contexts to which they refer; they simply describe conduct that would necessarily exceed any privileged use of force in those different contexts." Id. at 1261 n.15. See also Ladnier v. Murray, 769 F.2d 195, 199 n.4 (4th Cir. 1985).

After Kidd, it is clear that Hall does not set out a constitutional standard applicable to all situations.[3] We must, therefore, evaluate the instruction given in light of the specific circumstances of this

[3]The dissent asserts that our decision today "effectively overrules" Hall and similar cases. In fact, we do not maintain that Hall was erroneously decided. Rather, we hold that the descriptive language in Hall is too case-specific to use as a universal, standard setting jury instruction. This conclusion is compelled by this court's reasoning in our most recent relevant decision, Kidd, 774 F.2d at 1261 & n.15.

case and the most recent decisions of the Supreme Court, this circuit, and other circuits.

III.

When the altercation occurred, Justice had already been arrested and bail had been set. He was, therefore, a pretrial detainee. See Bell v. Wolfish, 441 U.S. 520, 523 (1979) (pretrial detainees are persons charged with a crime but not yet convicted of that crime). The source of constitutional protection against the use of excessive force on a pretrial detainee is the detainee's liberty interest in bodily security, grounded in the fifth and

fourteenth amendments.[4] Kidd, 774 F.2d at 1258-1260; see also Fiacco v. City of Rensselaer, Nos. 85-7234,-7266, slip op. at 1538-40 (2d Cir. Feb. 11, 1986)(excessive force after arrest but before reaching police station covered by fifth and fourtheenth amendments).

Decisions dealing with the fourth amendment right of arrestees and the eighth amendment right of convicted persons to be free from excessive force or cruel and unusual punishment are

[4]At oral argument, appellant's counsel maintained that Justice fell within the fourth amendment's protection against unreasonable seizures. The fourth amendment is the source of protection when an individual is subject to excessive force during an arrest. See Jenkins v. Averett, 424 F.2d 1228, 1231-32 (4th Cir. 1970). Because the altercation occurred after Justice had been seized and there is no indication that Justice was attempting to escape, we believe his protected interest falls more appropriately within the purview of the fifth, not the fourth, amendment.

nonetheless relevant to this case. The fundamental inquiry in all excessive force cases, regardless of the protected interest's fourth, fifth, or eighth amendment origins, is whether the degree of force was necessary to protect a legitimate state interest, and therefore permissible under all the circumstances. See Kidd, 774 F.2d at 1260-61. While force sufficient for a state tort claim does not necessarily rise to a constitutionally violative level, see Daniels v. Williams, U.S. ____, 106 S.Ct. 662, 666 (1986), at some point the force is so disproportionate to the circumstances that it is constitutionally tortious. See Tennessee v. Garner, ____ U.S. ____, 105 S.Ct. 1694, 1699 (1985)(balancing of

all the circumstances required to resolve fourth amendment excessive intrusion cases); Slakan v. Porter, 737 F.2d 368, 372 (4th Cir. 1984), cert. denied, 105 S.Ct. 1413 (1985) (although convicted prisoner's misconduct merited some disciplinary response, means used were so disproportionate under the circumstances as to violate the prisoner's eighth amendment rights). Factors relevant to assessing disproportionality include, but are not limited to, the need for the force, the degree of force applied, the injuries inflicted, and totality of the circumstances surrounding the use of the force. Cf. King v. Blankenship, 636 F.2d 70, 73 (4th Cir. 1980)(quoting factors listed in Johnson v. Glick, 481

F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)).

IV.

The instruction given in this case must be evaluated in light of this multi-factor, totality of the circumstances standard. A judge's desire to focus the jury's inquiry through the use of descriptive adjectives is understandable. Nevertheless, the instruction challenged in this case is unacceptable because it is inaccurate and internally inconsistent. The instruction improperly suggests a series of requirements for liability and erroneously implies that Dennis must be exonerated unless he acted maliciously or sadistically.

force claim. Proof of bad motive, evil intent, or "ulterior purpose" is not required. Id. at 1232-33.

Two other circuits share our view that malice is not required for an excessive force claim based on the fifth and fourteenth amendments. See Fernandez, No. 85-1403, slip op. 1548. But cf. Hendrix v. Matlock, No. 85-2290, slip op. at 3218 (5th Cir. Feb. 18, 1986) (retaining malice requirement for fourth and fourteenth amendment claim of excessive force on an arrestee). Twice, the Supreme Court has refused to discuss whether "something less than intentional conduct, such as recklessness or 'gross negligence' is enough to trigger the protections of the Due Process clause." Daniels, 106 S.Ct. at 667 n.3; see Whitley, 54 U.S.L.W. at 4239. In

The first specific flaw in the instruction is its formulation of the "shocks the conscience" test of Rochin v. California, 342 U.S. 165, 172 (1952). Rochin's language commonly is employed in excessive force cases, see e.g., Whitley v. Albers, 54 U.S.L.W. 4236, 4240 (U.S. Mar. 4, 1986); Fernandez v. Leonard, No. 85-1403, slip op. at 15 (1st Cir. Mar. 6, 1986), although its clarity in setting an ascertainable guide for a jury may be questioned. Cf. Smith v. Wade, 461 U.S. 30, 50-51 (1983)(suggesting vagueness challenge to instruction imposing section 1983 liability if, inter alia, the conduct "shock[s] the sensibilities"). If a "shocks the conscience" instruction is given, it

must be faithful to Rochin. The instruction given in this case is not.

The jury was instructed to assess whether the conduct was "so brutal, demeaning and harmful as literally to shock the conscience of a court." To the extent that this instruction invites a jury to infer how a judge would react, the flaw is obvious.[5] Furthermore, Rochin, 342 U.S. at 170-72, makes clear that the "conscience" at issue is that of the community in light of evolving societal norms, not that of any particular judge or court. Finally, by

[5]In the next sentence, the jury was instructed that the force had to be "literally shocking to the conscience," not shocking to the conscience "of a court." It is impossible to ascertain, therefore, whether the jurors thought they were to employ their personal norms, their view of a judge's norms, or their view of general, societal norms of "shocking" behavior.

focusing on words such as "brutal," "demeaning," and "literally shocking," without explaining that these descriptives are one end of a spectrum intended to b juxtaposed with conduct that merely "offend[s] some fastidious squeamishness or private sentimentalism about combatting crime too energetically," id. at 172, the instruction suggests an overly high threshold for Dennis' liability.

The second problem with the instruction is that the following passage appears to set out three requirements for liability, nor merely three factors meriting consideration when balancing all the circumstances.

> You must determine whether the force applied caused injury so severe, was so disproportionate to the need

> presented and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal or inhumane abuse of official power literally shocking to the conscience.

At least one circuit has adopted a checklist of requirements, all of which must be met in order to hold a law enforcement officer liable. See Gumz v. Morrissette, 772 F.2d 1395, 1400 (7th Cir. 1985). We have avoided that position, however, in favor of a multi-factor approach in which all the circumstances are considered. See Kidd, 744 F.2d at 1261. In order to be consistent with Kidd's case-by-case, fact-oriented approach, the trial court must impress upon the jury that the factors it lists are merely issues worth

considering. They are not all-inclusive requirements for liability.[6]

The third and most difficult problem with the instruction is its incorporation of Hall's inquiry into whether the force "was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal or inhumane abuse of official power literally shocking to the conscience." Hall, 621 F.2d at 613. This language was based, see id., on the following passage in Johnson v. Glick, 481 F.2d at 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973), a seminal case recognizing a prisoner's due process right to be free from excessive force.

> In determining whether the constitutional line has been

[6]The interpretation of these considerations as relevant factors, not an inclusive list of requirements, is consistent with Johnson v. Glick, 481 F.2d at 1033, a frequently cited case in this area. See, e.g., Whitley, 54 U.S.L.W. at 4239 (quoting Johnson); King, 636 F.2d at 73 (quoting Johnson). In Johnson, Judge Friendly introduced a list of concerns similar to those in the instruction by stating, "In determining whether the constitutional line has been crossed, a court must look to such factors as...." Johnson, 481 F.2d at 1033 (emphasis added).

> crossed, a court must look to such factors as...whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

To the extent that the instruction implies that malice or sadism is a requirement for imposing liability on Dennis, it misstates the law of this circuit. In Ladnier v. Murray, 769 F.2d 195, 199 n.4 (4th Cir. 1985), this court interpreted Johnson to mean that "proof of malice will elevate the common law causes of action to constitutional torts, but is not required to prove a constitutional tort." Cf. Kidd, 774 F.2d at 1261 & n.15. In Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970), we held that recklessness, wantonness, or gross and culpable negligence may be sufficient for a section 1983 excessive

the absence of a Supreme Court ruling that gross negligence or reckless conduct cannot violate the fourteenth amendment,[7] we adhere to our precedent that in some circumstances, law enforcement officers may be liable to a pretrial detainee for not only

[7]In Daniels, 106 S.Ct. 662, the Court held that simple negligence is insufficient for section 1983 recovery for a prisoner's deprivation of life, liberty, or property in violation of the fourteenth amendment. See also Davidson v. Cannon, ___ U.S. ____, 106 S.Ct. 668, 670 (1986). In Whitley, 54 U.S.L.W. at 4239, the Supreme Court held that "a reliable inference of wantonness," which is "tantamount to a knowing willingness" is required to submit an eighth or fourteenth amendment claim of excessive force in quelling a prison riot to a jury. The Court deliberately "implied nothing" about whether "recklessness" or"gross negligence," both of which are less intentional than "wanton" conduct, would be sufficient to permit recovery by pretrial detainees under the due process clause of the fourteenth amendment. Id. at 4241.

malicious, but also reckless, wanton, or grossly negligent conduct.

To the extent that the instruction sets out a spectrum with malice and sadism on one end and simple negligence on the other, it is misleading because it does not indicate at which point the constitutional line is crossed. Although some jurists maintain that the proper definition of "malice" is recklessness or wantonness, see e.g., Smith v. Wade, 461 U.S. 30 (debating proper definition of malice for punitive damages in section 1983 case), this jury was instructed that malicious action must be accompanied by "ill-will, spite, or grudge." Sadism was not defined. Consequently, even under a generous construction, the instruction sets out a spectrum in which intentional conduct is

contrasted with simple negligence. The instruction does not suggest that conduct short of intentional wrongdoing, such as wantonness, recklessness, or gross negligence, is sufficient for the imposition of liability. In fact, a fair interpretation is that intentional wrongdoing is required. As we have discussed above, such an interpretation overstates the burden on Justice.

V.

The challenged instruction was one of several instructions, some of which acceptably stated the law governing constitutional claims of excessive force.[8] The fact that more accurate

[8]For example, at one point, the trial court told the jury that the force must be assessed "in light of all of the surrounding circumstances." After giving the challenged instruction in which requirements for recovery arguably are set out, the court repeated

instructions were given does not solve the problem with this case, however. Although a jury charge must be considered as a whole, if instructions conflict and one is prejudicial, the charge is fatally flawed. United States v. Walker, 677 F.2d 1014, 1016 n.3 (4th Cir. 1982). Furthermore, if a charge "compels or even invites reasonable jurors to accept an unconstitutional view of the law," the error is not harmless. Cooper v. State of North Carolina, 702 F.2d 481, 483 (4th Cir. 1983). We are convinced that the standard-setting instruction given in this case was so important and so flawed that a new trial must be granted.

Our grant of a new trial implies nothing about the ultimate merit of Justice's claim. In some situations, the use of physical force or even mace to subdue an individual may be consititutional. See Bailey v. Turner, 736 F.2d 963 (4th Cir. 1984)(use of mace). In other circumstances, such responses are excessive. It is the jury's prerogative to resolve the conflicts in the testimony of Justice, Dennis, and Rose, to decide what degree of force actually was used, and to assess whether that force was constitutionally excessive. In making those assessments, however, the jury must be guided by a clear, accurate, and even-handed statement of the constitutional standard. Because the standard-setting instruction given by

the trial court was not accurate and even-handed, the judgment for Dennis is hereby reversed, and this case is remanded for a new trial.

REVERSED AND REMANDED

HALL, Circuit Judge, dissenting:

I must express my frank amazementt at the result reached by the majority which today discovers reversible error in a jury instruction that faithfully follows the express language of binding authority in this Circuit. I find the majority's action both procedurally and legally defective.

The portion of the jury instruction quoted on page 4, supra, is, as the majority concedes, virtually a verbatim

quote from this Court's opinion in Hall v. Tawney.[1/] The Hall language was reaffirmed as embodying this Circuit's rule on excessive force in Bailey v. Turner. Although questioned in part, an instruction containing the same language that is at issue here was treated as valid in Ladnier v. Murray.

The majority lightly disregards these decisions with a conclusory observation that "verbatim repetition of the language of a previous decision does not guarantee that a jury instruction

[1/] Hall admittedly dealt with corporal punishment in public schools rather than with a claim of police brutality. The Court conducted, however, a thorough inquiry into the nature of subtantive due process in excessive force claims and articulated the formulation used by the district court in this instance. The language in Hall was also cited as controlling authority in King v. Blankenship, which clearly was an excessive force case.

properly states the standard...." Unless we intend to require clairvoyance by trial judges, I fail to see how else a district court in this Circuit is to determine the law except by reliance on this Court's clearly expressed opinions.[2/] The majority's decison effectively overrules Hall v. King and Turner and, thereby appropriates unto itself the power properly exercised only

[2/]A verbal formulation utilized in a single appellate decision may not automatically be appropriate as a jury instruction. However, when that language has been repeatedly cited as the embodiment of the essential inquiry in cases of that type, it strains credulity to suddenly discover that it is improper to offer it as guidance to a jury. Certainly, the majority has cited no authority in which a trial court's instruction to a jury which conforms to the decisions of the controlling appellate court have been held to be reversible error. At most, Kent v. Smith, supra, establishes the trial judge's authority to refuse a proposed instruction even though it may follow language in a prior case.

by this Court sitting en banc. In my view, a panel may not, in the guise of distinguishing existing authority, distinguish it out of existence.

Although I believe that the majority's assault on the doctrine of stare decisis is sufficient alone to render its decision fatally defective, I also disagree with its conclusion that the "shocking to the conscience" language sets an unconstitutionally high threshold for section 1983 liability. The use of force against a resisting pretrial detainee is subject to privilege and entitled to the judicial deference due the decisions of individuals charged with maintaining control of detention facilities. Bell v. Wolfish, supra. If federal courts are to avoid improperly turning state

tort law into a source of section 1983 liability, Baker v. McCollan, 443 U.S. 137 (1979), then juries must be given clear guidance on the higher level of misconduct necessary to raise a constitutional claim. Whether the Hall formulation at issue here stated the actual constitutional standard or simply described the level of state conduct necessary to violate the standard as suggested in Kidd, supra, makes little practical difference. Under either analysis, the jury in this instance was properly informed that section 1983 liability requires behavior more egregious than that normally needed to sustain a state tort claim. I see no error in that instruction.

In a misguided effort to establish what it designates as a "clear, accurate

and even-handed statement of the constitutional standard" the majority tramples upon unequivocal precedent in this Circuit. The result is not only a doubtful statement of the law, but also a severe and demoralizing impediment to the orderly operation of the district courts. I respectfully and emphatically dissent.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

November 25, 1987

TO: James J. Wall

W. Dale Talbert

Isaac T. Avery, III

NOTICE OF JUDGMENT

Judgment was entered in Case No. 85-1431 this date.

The Court's opinion is enclosed.

Petition For Rehearing (FRAP 40)

FILING TIME	A petition must be received in the Clerk's Office within 14 days after the judgment date set forth above. No extension will be granted

save for the most compelling reasons. Requests based on grounds such as miscalculation of time or a need to consult with others will be preemptorily denied.

PURPOSE

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.
3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

STATEMENT OF COUNSEL

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose" section. The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

FORM

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition, however, a pro se party who is indigent

may file the original only.

Bill of Costs (FRAP 39)

FILING TIME — A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

ISSUANCE TIME — The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

STAY — A motion for stay of issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

JOHN M. GREACEN
CLERK

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT	Eastern District of North Carolina
GARY W. JUSTICE	83-94-CIV-4
v.	
JOHN W. DENNIS, indivdually and in his official capacity as North Carolina State Highway Patrolman	Charles K. McCotter, Jr.

XX Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that plaintiff have and recover NOTHING of the defendant.

THE ABOVE-JUDGMENT WAS ENTERED THIS DAY, MARCH 7, 1985 AND COPIES MAILED TO:

James J. Wall
Legal Services of the Lower Cape Fear
16 South Front Street
Wilmington, North Carolina 28402

Kathleen M. Shannon
Legal Services of the Lower Cape Fear
16 South Front Street
Wilmington, North Carolina 28402

Isaac T. Avery, III
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

J. RICH LEONARD

March 7, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NEW BERN DIVISION

GARY WAYNE JUSTICE, Plaintiff,	*	
v.	*	No. 83-111-CIV-4
JOHN W. DENNIS, individually, and in his official capacity as a North Carolina State Highway Patrolman, Defendant.	*	

V E R D I C T

First, Did the Defendant, John W. Dennis, knowingly use excessive force in his conduct towards the Plaintiff, Gary W. Justice, depriving him of his federal constitutional rights?

_____ Yes ___X___ No

If you answer the First issue "No," that ends your consideration of plaintiff's claim and you would return this issue as your verdict.If you answer the First

issue "Yes," then you would proceed to the Second issue.

Second, What amount of actual damages, if any, is the Plaintiff entitled to recover from the Defendant?

Answer in Dollars:

$_____

Now, unless you answer the Second issue in some amount, you will not consider the Third issue; but if you answer the Second issue in any amount, you will take up and consider the Third issue.

Third, What amount of punitive damages, if any, is the Plaintiff entitled to recover from the Defendant?

Answer in Dollars:

$_____

SO SAY WE ALL.

TOMMY A. SMITH
FOREMAN

DATE: MARCH 7, 1985

CHARGE OF THE COURT

THE COURT: Hearing none, you may bring the jury back.

(The jury returned to the courtroom and closing arguments were presented to the jury).

--JURY PRESENT-- 11:15 A.M.

THE COURT: Members of the jury, now it is time for the Court to give you your final instructions before you retire to deliberate on your verdict.

You have heard all of the evidence and the argument of counsel. It becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you and to apply that law to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by me.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our

system of law does not permit jurors to be governed by prejudice or sympathy or public opinion.

Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community and holding the same or similar stations in life. The law is no respecter of persons and all persons stand equal before the law and are to be dealt with as equals in a court of justice.

As stated earlier, it is your duty to determine the facts and in so doing

you must consider only the evidence I have admitted in the case.

The term evidence includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case and, in so doing, to call to your attention certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case.

What the lawyers say is not binding upon you.

So while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and the exhibits as you feel are justified in the light of common experience.

In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and the evidence in the case.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true and accurate.

You are the sole judge of the credibility or believability of each witness and the weight to be given to his testimony.

In weighing the testimony of a witness you should consider his relationship to the plaintiff or to the defendant; his interest if any in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence and the extent to which he has been supported or contradicted by other credible evidence.

You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or nonexistence of any fact.

You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or impeached by contradictory evidence by showing that he testified falsely concerning a material matter or by evidence that at some time the witness has said or done something or failed to say or do something which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your

exclusive province to give the testimony of that witness such credibility or weight if any as you may think it deserves.

The rules of evidence provide that a scientific, technical or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue.

A witness qualified as an expert by knowledge, skill, experience training or education may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves.

If you should decide that the opinion of an expert witness is not based upon sufficient education and

experience or if you should conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

The Court may take judicial notice of certain facts or events. When the Court declares it will take judicial notice of some fact or event, the jury must, unless otherwise instructed, accept the Court's declaration as evidence and regard as proved the fact or event which has been judicially noticed.

Evidence that at some other time a witness not a party to this action has said or done something which is inconsistent with the witness' testimony at the trial may be considered for the

sole purpose of judging the credibility of the witness but may never be considered as evidence or proof of the truth of any such statement.

Where, however, the witness is a party to the case and by such statement or other conduct admits some fact or facts against his interest then such statement or other conduct if knowingly made or done may be considered as evidence of the truth of the fact so admitted by such party, as well as for the purpose of judging the credibility of the party as a witness.

An act or omission is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

The burden is on the plaintiff in a civil action such as this to prove every

essential element of his claim by a preponderance of the evidence.

A preponderance of the evidence means such evidence as when considered and compared with that opposed to it has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true.

In other words, to establish a claim by a preponderance of the evidence merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all of the witnesses regardless of who may have called them and all of the exhibits received in

evidence regardless of who may have produced them.

If the proof should fail to establish any essential element of the plaintiff's claim by a preponderance of the evidence the jury should find for the defendant as to that claim.

In this case the plaintiff claims damages alleged to have been sustained by him as result of a deprivation under color of state law of rights secured to the plaintiff both by the Constitution of the United States and by an Act of Congress providing for equal rights of all persons within the jurisdiction of the United States.

Specifically, the plaintiff alleges that on or about December 19, 1982, in the County of Onslow, State of North Carolina, the defendant John W. Dennis

was a highway patrolman in the State of North Carolina and that while acting as a highway patrolman under color of the laws of the State of North Carolina, the defendant knowingly subjected the plaintiff to a deprivation of the Constitutional right not to be deprived of his liberty without due process of law, by unlawfully imposing corporal punishment upon the plaintiff which consisted in spraying plaintiff in the face with mace and breaking out the plaintiff's front teeth.

Plaintiff alleges that as a result he suffered actual damages in the sum of One Hundred Thousand Dollars.

Plaintiff further alleges that the acts of the defendant as alleged were maliciously, wantonly and oppressively done and by reason thereof the plaintiff

asks for an award of One Hundred Thousand Dollars as punitive and exemplary damages in addition to the actual or compensatory damages claimed by him.

Section 1983 of Title 43 of the United States Code provides that any citizen may seek redressin this court by way of damages against any person or persons who, under the color of state law or custom, subject such citizen to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or the laws of the United States.

Specifically, the plaintiff alleges that while the defendant was acting under color of authority of the State of North Carolina as a member of the North Carolina Highway Patrol, he subjected

the plaintiff to the deprivation of the Constitutional right to be free from the use of excessive force against his person.

You are instructed as a matter of law that under the Constitution of the United States every citizen has the Constitutional right not to be subjected to unreasonable force upon his person while being arrested by a law enforcement officer, even though such arrest is otherwise made in accordance with due process of law.

On the other hand, in making a lawful arrest, an officer has the right to use such force as is necessary under the circumstances to effect the arrest. Not every use of force by a law enforcement officer amounts to a deprivation of rights, privileges or

immunities secured or protected by the Constitution or laws of the United States.

Whether or not the force used in making an arrest was unnecessary, unreasonable or violent is an issue to be determined in the light of all of the surrounding circumstances, on the basis of that degree of force a reasonable and prudent officer would have applied in effecting the arrest under the circumstances disclosed in this case.

In order to prove his claim, therefore, the burden is upon the plaintiff to establish by a preponderance of the evidence in the case each of the following elements:

One, that the defendant knowingly used excessive force in his conduct toward the plaintiff, depriving him of

his Federal Constitutional rights previously mentioned;

Two, that the defendant then and there acted under color of the authority of the State of North Carolina;

Three, that the defendant's acts and conduct were the proximate or legal cause of damages sustained by the plaintiff.

Acts are done under color of the authority of a state not only when state officials act within the bounds or limits of their lawful authority but also when such officers act without and beyond the bounds of their lawful authority.

In order for unlawful acts of an official to be done under color of authority, however, the unlawful act must be done while the official is

purporting or pretending to act in the performance of his official duties. That is to say, the unlawful act must consist in an abuse or misuse of power which is possessed by the official only because he is an official, and the unlawful acts must be of such a nature and be committed under such circumstances that they would not have occurred except for the fact that the person committing them was an official purporting to exercise his official power.

Members of the jury, you are instructed to use the following standard for determining the amount of force necessary to make the defendant liable.

The force used by the officer is unconstitutionally excessive if the officer used a means so brutal,

demeaning and harmful as literally to shock the conscience of a court.

You must determine whether the force applied caused injury so severe, was so disproportionate to the need presented and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.

In addition, the due process guaranties of the Fourteenth Amendment include protection from punishment for a crime until after conviction by a court of law.

Thus, if police act in excess of their lawful authority and beat or inflict corporal injury upon suspects by way of punishment for supposed offenses,

their actions are in contravention of due process of law.

In order to establish that he has been subjected to a deprivation of his Constitutional rights, plaintiff must establish by a preponderance of the evidence that the defendant acted outside of his lawful authority.

As a North Carolina State Highway Patrolman, the defendant had the lawful authority, indeed the lawful duty under the state law to enforce the laws of the State of North Carolina and to arrest, take into custody and bring under control any person he had probable cause or reasonable grounds to believe had violated the laws of the State of North Carolina.

The mere fact that the evidence in the case may establish some physical

contact between the defendant and the plaintiff during the course of the arrest and processing which resulted in personal injury to the plaintiff is not proof that the defendant acted beyond his lawful authority under state law.

The defendant has a lawful authority under state law to use such physical force upon another person when and to the extent that the officer reasonably believes it necessary.

The reasonableness or excessiveness of the force used to effect an arrest must be considered in light of the circumstances as they appeared to the officer at the time.

It is a crime under the laws of the State of North Carolina for any person to resist, obstruct or delay a highway

patrolman in the performance of his official duties.

Under North Carolina law a person commits a crime when he resists a lawful arrest and he is required to peaceably accompany a highway patrolman who has placed him under arrest.

The plaintiff is required to peaceably accompany a highway patrolman.

If the person being processed resists, obstructs or delays the processing, a highway patrolman may use sufficient force to overcome the resister.

If the resister attempts to inflict serious bodily injury on the trooper the trooper may resort to extreme measures to avoid serious injury and to accomplish the arrest and to prevent the escape.

Serious danger means danger of death or serious bodily injury, although it does not require that plaintiff threatened the trooper with a weapon.

A highway patrol officer is not required to exchange blow for blow with a prisoner. He can use force over and above that used by the prisoner in order to overcome the resistance, prevent the escape or to protect himself.

Mere negligent use of fore although it results in injury does not allow recovery in a case of this type. In order for negligence to be a base of recovery, the negligence must be so gross as to indicate a complete disregard for the physical integrity or rights of the plaintiff.

If you find from the preponderance of the evidence in the case that the

highway patrolman used more or greater force or means on the plaintiff than would have appeared to a reasonable person at the time the events occurred and under like circumstances to be necessary in order to accomplish any lawful purpose or purposes intended, that is, if you find that the trooper acted unlawfully and contrary to the laws of the State of North Carolina, you must then decide whether the trooper deprived the plaintiff of a right or liberty secured by the Constitution of the United States without due process of law.

In the jury's consideration of what is or is not excessive force the jury is to consider not only the actions of the law enforcement officer but also to consider the actions of the plaintiff

and what effects the words, attitudes and actions of the plaintiff might have had on the officer given the facts and circumstances that confronted the officer at that time.

So even though you should find from a preponderance of the evidence in the case that the acts alleged by the plaintiff were in fact knowingly done by the defendant, if you also find that they were done for any one or more of the lawful purposes mentioned, such conduct of the defendant was not beyond the bounds of his lawful authority under state law and so was lawful unless you further find from a preponderance of the evidence in the case that the defendant used more or greater force or means on the plaintiff than would have appeared to a reasonable person in like

circumstances to be necessary in order to accomplish the lawful purpose or purposes intended.

In order to make out a claim for damages against the defendant the plaintiff must prove that the defendant acted with such an impermissible motivation or with such disregard for the plaintiff's clearly established Constitutional rights that his action cannot reasonably be characterized as being in good faith.

In determining whether the Constitutional line has been crossed, a court must look to such factors as the need for application of force, the relationship of the need and the amount of force that was used, the extent of injury inflicted and whether force was applied in a good faith effort to

maintain or restore discipline or maliciously, sadistically, for the very purpose of causing harm.

Now, in summary, if you find from a preponderance of the evidence in the case after applying these instructions of the law that the plaintiff has proved his claim that he was subjected to an unreasonable force, your verdict will be for the plaintiff and against the defendant.

On the other hand, if you find that the plaintiff has not proved any of his claims of Constitutional deprivation, then of course, your verdict will be for the defendant and against the plaintiff.

If you should find for the plaintiff and against the defendant, however, you must then decide the second issue, which reads as follows:

What amount of actual damages, if any, is the plaintiff entitled to recover?

If you find in favor of the plaintiff you will then award him such actual or compensatory damages as you find from a preponderance of the evidence as will reasonably compensate him for any pain, suffering and mental anguish already suffered by him and proximately resulting from the injury in question.

Now, only damages which are the direct and proximate result of the defendant's acts or omissions may be recovered as actual or compensatory damages.

Any injury or damage is proximately caused by an act or failure to act whenever it appears from the evidence in

the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

If you should find that the plaintiff is entitled to a verdict but not find that the plaintiff has sustained substantial or actual damages, then you may return a verdict for the plaintiff in some nominal sum such as One Dollar.

The first element of damages you should consider is any bodily injury sustained by the plaintiff and any resulting pain and suffering, disfigurement and mental anguish.

No evidence of the value of such intangible things as mental or physical

pain and suffering has been or need be introduced.

In that respect, it is not the value you are trying to determine but an amount that will fairly compensate the plaintiff for the damages he has suffered.

There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Any such award should be fair and just in light of the evidence.

The second element of damage you should consider is the reasonable expense of medical, dental care, and other treatment necessarily or reasonably obtained by the plaintiff in the past or to be so obtained in the future.

If the jury should find that the plaintiff is entitled to a verdict and further find that the evidence in the case establishes a reasonable likelihood of future medical expense, then it becomes the duty of the jury to ascertain the present worth in dollars of such future damage, since the award of future damages necessarily requires that payment be made now for a loss that will not actually be sustained until some future date.

Under these circumstances the result is that the plaintiff will in effect be reimbursed in advance of the loss and so will have the use of the money which he would not have received until some future date but for the verdict.

In order to make a reasonable adjustment for the present use, interest free, of money representing a lump sum payment of anticipated future loss, the law requires that the jury discount or reduce to its present worth the amount of the anticipated future loss by taking, one, the interest rate or return which the plaintiff could reasonably be expected to receive on an investment of the lump sum payment together with the period of time over which the future loss is reasonably certain to be sustained, and then reduce or in effect deduct from the total amount of anticipated future loss whatever that amount would be reasonably certain to earn or return if invested at such rate of interest over such future period of time and include in the verdict an award

for only the present worth, the reduced amount of the total anticipated future loss.

Now, unless you answer the second issue as to actual or compensatory damages in some amount, you will not consider the third issue.

But if you answer the second issue in any amount, you will then take up and consider the third issue, which reads,

What amount of punitive damages, if any, is the plaintiff entitled to recover?

Here again, the burden of proof is upon the plaintiff to satisfy you by a preponderance of the evidence that you should award punitive damages in this case and the amount thereof.

In addition to actual damages, the law permits the jury under certain

circumstances to award the injured person punitive and exemplary damages in order to punish a wrongdoer for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that the plaintiff is entitled to a verdict for actual damages and should further find that the acts of the defendant which proximately caused the actual damages were maliciously or wantonly or oppressively done, then the jury may in the exercise of discretion, if they unanimously choose to do so, add to the award of actual damages such amount as the jury shall unanimously agree to be proper as punitive and exemplary damages.

An act or failure to act is maliciously done if performed or accompanied by ill will, spite or grudge, either toward the injured person individually or toward all persons in one or more groups or categories of which the injured person is a member.

An act or failure to act is wantonly done if done in a reckless or callous disregard or indifference to the rights of one or more persons, including the injured person.

An act or failure to act is oppressively done if done in a way or manner which injures or otherwise violates the right of another person with unnecessary harshness or severity as by misuse or abuse of authority or power or by taking advantage of some

weakness or disability or misfortune of another person.

Whether or not to make any award for punitive and exemplary damages in addition to actual damages is a matter exclusively within the province of the jury if the jury should unanimously find from a preponderance of the evidence that the defendant's acts or omissions which proximately caused actual damage were maliciously or wantonly done.

But the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first, unanimously award the plaintiff a verdict for actual or compensatory damages.

The jury should also bear in mind not only the conditions under which and the purposes for which the law permits

an award for punitive damages to be made but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reasoning, and must never be either awarded or fixed in an amount because of any sympathy, bias or prejudice with respect to any party in the case and must be found by a preponderance of the evidence to have been the proximate result of the acts or omissions of the defendant.

If you come to answer this issue at all, you will only answer it in such an amount as you find will reasonably represent the punitive damages to be awarded in this case under the definitions and instructions which I have given you.

Of course, the fact that I have given you instructions concerning the issue of plaintiff's damages should not be interpreted in any way as an indication that I believe the plaintiff should or should not prevail in this case.

Your verdict must represent the considered judgment of each juror. In order to return the verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment.

Each of you must decide the case for yourself but only after an impartial

consideration of all the evidence in the case with your fellow jurors.

In the course of your deliberations do not hesitate to re-examine your own view and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember that at all times you are not partisans, you are judges, judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room, you should first select one of your members to act as your foreman who will preside

over your deliberations and will be your spokesman here in court.

A form of verdict has been prepared for your convenience. The form of verdict has the caption of the case and is entitled, verdict. It reads,

First, did the defendant, John W. Dennis, knowingly use excessive force in his conduct toward the plaintiff, Gary W. Justice, depriving him of his Federal Constitutional rights.

It has a place for you to record your answer, yes, or no.

If you answer the first issue no, that ends your consideration of plaintiff's claim and you would then return this issue as your verdict.

If you answer the first issue yes, then you would proceed to the second issue, which reads,

Second, what amount of actual damages, if any, is the plaintiff entitled to recover from the defendant?

Then it has a place for answer in dollars.

Now, unless you answer the second issue in some amount, you will not consider the third issue. But if you answer the second issue in any amount you will take up and consider the third issue, which reads,

Third, what amount of punitive damages, if any, is plaintiff entitled to recover from the defendant.

And it has a place for answer in dollars.

Then it has a place for the signature of the foreman and the date.

Madam Clerk, I am going to hand you the verdict form to be stapled and put

in an envelope and hand it to the jury when I let the jury go to the jury room.

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict you will have your foreman fill it in, date and sign it and then return to the courtroom.

If during your deliberations you should desire to communicate with the Court please reduce your message or question to writing, signed by the foreman, and pass the note to the Marshall who will bring it to my attention.

I will then respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address you orally.

I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

I have these instructions in writing so I am going to give them to you to carry to the jury room.

I ask that you excuse the typographical errors that are in there; there are not many but there are about five or six or seven or so, so I would ask you to excuse the misspellings. I think the words are obvious as to the correct spelling.

One other instruction I am required to give you. Out of consideration for jurors who are non-smokers and in recognition of health problems

associated with smoking, the Court prohibits smoking in the jury room.

We all know, however, that smoking is a habit which is enjoyed by some persons and therefore, the Court directs that the foreperson of the jury shall provide smoking breaks upon request at approximately ninety minute intervals. During the breaks, smokers may leave the jury room and have a five minute break in the jury vestibule or hall for smoking.

During the time deliberations are to cease so that no case consideration or discussion goes on without all twelve jurors being present.

Your adhering to these rules will be appreciated by everyone.

All right. Would counsel approach the bench, please?

(BENCH CONFERENCE)

THE COURT: Are there any corrections or additions?

MR. WALL: I wonder if you would instruct them that you have no opinion on this case in nothing you said.

THE COURT: I think I instructed that already. I instructed them preliminarily on that. I usually instruct them on that. You all should have noted it in the beginning.

MR. AVERY: I don't make that request.

THE COURT: All right.

(END BENCH CONFERENCE)

THE COURT: Members of the jury, one further thing, nothing that the Court may say or do during the course of the trial should be taken by you as

indicating what your verdict should be.

At this time, have Mr. Terrell sworn as the Bailiff.

(Bailiff Sworn)

THE COURT: At this time I am going to ask that Ms. Bessie Smith step down, please.

(Alternate juror excused from the jury)

THE COURT: Ms. Smith is the alternate juror and since we now have the case ready to go to the jury for deliberations and we have had no need for an alternate juror to sit on the jury, I am going to ask that the twelve jurors at this time leave the courtroom and go the jury room and begin your deliberations.

(Jury retired)

12:00 P.M.

VERDICT

(The jury returned to the courtroom)

1:30 P.M.

THE COURT: Who is the foreman of the jury?

FOREMAN: I am.

THE COURT: Has the jury reached a unanimous verdict?

FOREMAN: Yes, sir, it has, Your Honor.

(Verdict passed to the Court).

THE COURT: Is it the unanimous verdict of the jury in answer to the first issue.

Did the defendant, John W. Dennis, knowingly use excessive force in his conduct towards the plaintiff, Gary W. Justice, depriving him of his Federal Constitutional rights,

Is it the unanimous verdict of the jury the answer to that
issue is no?

FOREMAN: Yes, sir.

THE COURT: Mr. Wall, do you wish to poll the jury?

MR. WALL: No, Your Honor.

(Jury excused)

MR. WALL: We give notice of appeal, Your Honor, to the United States Court of Appeals for the Fourth Circuit.

TRIAL ADJOURNED

1:35 P.M.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1343 provides, in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> > (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But

Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United states, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(3)

No. 87-1422

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GARY W. JUSTICE,

Petitioner,

v.

JOHN W. DENNIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

Page No.

REASONS WHY WRIT OF CERTIORARI IS NOT APPROPRIATE IN THIS CASE 1

ARGUMENT

I. THERE IS NO DIRECT CONFLICT BETWEEN THE CIRCUITS CONCERNING WHAT FACTORS ARE APPLIED IN DETERMINING IF THE FORCE USED BY AN OFFICER IS EXCESSIVE 2

II. THE INSTRUCTIONS ARE NOT VAGUE AND THIS ISSUE DOES NOT INVOLVE AN IMPORTANT FEDERAL QUESTION 12

III. THE OPINION BELOW DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page No.

Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) 13

Black v. Rutherford, 468 U.S. 576, 104 S.Ct. 3227. 82 L.Ed.2d 438 (1984) 13

Black v. Stephens, 662 F.2d 181 (3rd Cir. 1981) 7

Burch v. Apalachee Community Mental Health Services, 840 F.2d 797 (11th Cir. 1988) 11

Childs v. Pellegrin, 822 F.2d 1382 (6th Cir. 1987) 8

Coon v. Ledbetter, 780 F.2d 1158 (5th Cir. 1986) 7

Dale v. Janklow, 828 F.2d 481 (5th Cir. 1986) 8

Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)..... 10,14

Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986) 10

Davis v. Forrest, 768 F.2d 257 (8th Cir.) 1985) 9

Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986) 5

Page No.

Fiacco v. City of Rensselaer,
783 F.2d 319 (2d Cir. 1986) 6

Franklin v. Aycock, 795 F.2d 1253
(6th Cir. 1986) 8

Gilmere v. City of Atlanta,
774 F.2d 1495 (11th Cir. 1985) 11

James v. Alfred, 835 F.2d 605
(5th Cir. 1988) 8

Johnson v. Glick, 481 F.2d 1028
(2d Cir. 1973), *cert den.,*
414 U.S. 1033, 94 S.Ct. 462,
38 L.Ed.2d 324 (1973) 2

Lester v. City of Chicago,
830 F.2d 706 (7th Cir. 1987) 9

Lewis v. Downs, 774 F.2d 711
(6th Cir. 1985) 8

Malhoyt v. Stover, 830 F.2d 237
(D.C. Cir. 1987) 12

Metzger v. Osbeck, 841 F.2d 518
(3rd Cir. 1988) 7

Norris v. District of Columbia,
737 F.2d 1148 (D.C. Cir. 1984) 12

O'Neill v. Krzeminski, 839 F.2d 9
(2d Cir. 1988) 7

Patzner v. Burkett, 779 F.2d 1363
(8th Cir. 1985) 9

Popham v. City of Kennesaw,
820 F.2d 1570 (11th Cir. 1987) 11

Page No.

Rinker v. City of Napa, 831 F.2d
829 (9th Cir. 1987) 10

Rochin v. California, 342 U.S. 165,
72 S.Ct. 205, 96 L.Ed.2d 183 (195- 6

Shillingford v. Holmes, 634 F.2d 263
(5th Cir. 1981) 8

Smith v. City of Fontana,
818 F.2d 1411, (9th Cir. 1987) 10

Tennessee v. Garner, 471 U.S. 1,
85 L.Ed.2d 1, 105 S.Ct. 1694 (1985) 13

Thompson v. Olson, 798 F.2d 552
(1st Cir. 1986) 6

Trujilla v. Goodman, 825 F.2d 1453
(10th Cir. 1987) 10

Ware v. Reed, 709 F.2d 345
(5th Cir. 1983) 8

Webb v. McCullough, 828 F.2d 1151
(6th Cir. 1987) 8

Whitley v. Albers, 475 U.S. 312,
106 S.Ct. 1078, 89 L.Ed.2d 251 (1986) 8

Wise v. Bravo, 666 F.2d 1328
(10th Cir. 1981) 10

42 U.S.C. § 1983 2

IN THE

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OCTOBER TERM, 1987

GARY W. JUSTICE,

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v.

JOHN W. DENNIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REASONS WHY WRIT OF CERTIORARI IS NOT APPROPRIATE IN THIS CASE

Summary of the Respondent's Arguments

I. There is no conflict between the Fourth Circuit's *en banc* opinion and other circuits' decisions involving the appropriate standard in a § 1983 excessive force claim based on a fifth amendment violation. In determining whether an officer's conduct was unreasonable all circuits consider whether the officer exceeded the limits of privileged force. One of the factors which a jury considers includes whether the force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

The terms "malice" and/or "shocks the conscience" are appropriate factors to consider in determining whether an officer has exceeded the privileged use of force. The fourth

circuit approved those terms as factors to consider and not a necessary element as the petitioner contends.

II. The petitioner for the first time contends "malice", "sadism", and "shocks the conscience" are unconstitutionally vague. These terms have been used by this Court and every circuit court in the country. The petitioner has failed to raise a substantial federal question.

III. The opinion below is consistent with this Court's decisions that a jury must determine if the level of force used was so unreasonable as to exceed the privilege accorded agents of the state. The petitioner suggests a federal jury should find liability based on mere negligence. That is inconsistent with the purpose of 42 U.S.C. § 1983 and cases decided by this Court.

ARGUMENT

I. THERE IS NO DIRECT CONFLICT BETWEEN THE CIRCUITS CONCERNING WHAT FACTORS ARE APPLIED IN DETERMINING IF THE FORCE USED BY AN OFFICER IS EXCESSIVE.

The petitioner contends the jury instructions given by the trial court were in conflict with legal principles set forth in the Second, Seventh, and Ninth Circuits Court of Appeals decisions.

The respondent contends the jury instructions taken as a whole fairly and adequately stated the pertinent legal principles widely accepted in an unconstitutional excessive force action and are not in conflict with the other circuits.

The instructions of the trial court followed the test set out in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973) (herein referred to as *Johnson* factors). The factors set out in the jury instructions provide a framework to determine whether the constitutional line has been crossed in cases where an individual alleges he was subject to unjustified abuse at the hands of government officials.

The petitioner takes the jury instructions out of context and argues the threshold of liability was raised by the Fourth Circuit. This is incorrect.

The relevant jury instructions stated:

> You are instructed as a matter of law that under the Constitution of the United States every citizen has the Constitutional right not to be subjected to unreasonable force upon his person while being arrested by a law enforcement officer, even though such arrest is otherwise made in accordance with due process of law.
>
> * * * * *
>
> Whether or not the force used in making an arrest was unnecessary, unreasonable or violent is an issue to be determined in the light of all of the surrounding circumstances, on the basis of that degree of force a reasonable and prudent officer would have applied in effecting the arrest under the circumstances disclosed in this case.
>
> * * * * *
>
> Members of the jury, you are instructed to use the following standard for determining the amount of force necessary to make the defendant liable.
>
> The force used by the officer is unconstitutionally excessive if the officer used a means so brutal, demeaning and harmful as literally to shock the conscience of a court.
>
> You must determine whether the force applied caused injury so severe, was so disproportionate to the need presented and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.

Mere negligent use of force although it results in injury does not allow recovery in a case of this type. In order for negligence to be a base [basis] of recovery, the negligence must be so gross as to indicate a complete disregard for the physical integrity or rights of the plaintiff.

* * * * *

So even though you should find from a preponderance of the evidence in the case that the acts alleged by the were in fact knowingly done by the defendant, if you also find that they were done for any one or more of the lawful purposes mentioned, such conduct of the defendant was not beyond the bounds of his lawful authority under state law and so was lawful unless you further find from a preponderance of the evidence in the case that the defendant used more or greater force or means on the plaintiff than would have appeared to a reasonable person in like circumstances to be necessary in order to accomplish the lawful purpose or purposes intended.

* * * * *

In order to make out a claim for damages against the defendant the plaintiff must prove that the defendant acted with such an impermissible motivation or with such disregard for the plaintiff's clearly established Constitutional rights that his action cannot reasonably be characterized as being in good faith.

* * * * *

In determining whether the Constitutional line has been crossed, a court must look to such factors as the need for application of force, the relationship of the need and the amount of force that was used, the

> extent of injury inflicted and whether force was applied in a good faith effort to maintain or restore discipline or maliciously, sadistically, for the very purpose of causing harm.

(App. pp 103-115)

The petitioner argues the trial court instruction required him to prove the use of force was motivated by malice and sadism.

The petitioner's argument has no merit. The Court of Appeals' *en banc* approved applying the *Johnson* factors as a widely accepted method of focusing on the inquiry of whether the patrolman exceeded his bounds of privilege in the use of force. The instructions concerning malice and sadism provide a framework to distinguish whether the force used was applied in a good-faith effort to restore discipline or for the very purpose of causing harm. The jury instructions provided factors to consider in determining whether the force applied was unreasonable in light of the officer's privilege to use force to maintain order and did not mandate any particular finding. Further, the Fourth Circuit rejected the petitioner's contention that the instructions required malice and sadism be found before liability attaches (A-14).

All circuits agree that a jury must distinguish between a privileged use of force by an officer and unreasonable force applied in violation of federal constitutional rights.

In order for a jury to determine whether the privilege has been exceeded, they are given factors to consider. All circuits use the *Johnson* factors. Some circuits, in addition, use "shocks the conscience" as a factor to further clarify whether the force used exceeded the privilege.

A review of the latest cases decided by each circuit indicates there is no direct conflict between them and the Fourth Circuit.

First Circuit

The petitioner contends *Fernandez v. Leonard*, 784 F.2d 1209 (lst Cir. 1986), does not require malice as a factor to be considered by the jury.

The issue in *Fernandez, supra,* was whether the defendants were entitled to summary judgment on the issue of qualified immunity. The Court expressly applied the *Johnson v. Glick test.*[1]

Five months after the *Fernandez* decision, the First Circuit again applied the *Johnson* factors and held the officer's conduct fell short of the "malicious police conduct involved in *Rochin*". *Thompson v. Olson,* 798 F.2d 552, 558 (lst Cir. 1986).

The First Circuit applies the same standards as the Fourth Circuit. Both rely on *Johnson* and *Rochin* to determine if an officer unconstitutionally exceeded the limits of privileged force.

Second Circuit

The petitioner contends the Second Circuit has flatly rejected using malice and sadism as factors in excessive force claims.

In *Fiacco v. City of Rensselaer,* 783 F.2d 319 (2d Cir. 1986), the Second Circuit did not overerule *Johnson v. Glick,* it merely held officers are not entitled to qualified immunity if they intentionally violate a clearly established constitutional right.

---

[1]In *Johnson v. Glick* (citation omitted, Judge Friendly wrote a carefully reasoned opinion explaining that the often unidentified due process right to be free of excessive use of force by government officials derived from *Rochin v. California* [342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952)], and he reaffirmed that the source of the right was in substantive due process.

Applying Judge Friendly's factors to determine if the constitutional line between a common-law action for assault and battery or wrongful death and a constitutional action for "conduct that shocks the conscience" . . . . Under *Johnson v. Glick* we must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing him harm.
Fernandez, supra, at 1215-16

In a recent case, the Second Circuit applied the *Johnson* factors including those indicative of the officer's state of mind. In *O'Neil v. Krzeminski,* 839 F.2d 9 (2nd Cir. 1988), the Second Circuit emphasized the distinction they made in *Fiacco.*[2] The jury instruction in this case is consistent with the Second Circuit.

Third Circuit

The petitioner cites one case where the Third Circuit discussed "shocks the conscience" but did not address malice. In *Black v. Stephens,* 662 F.2d 181 (3rd Cir. 1981), the defendant argued the evidence was insufficient to show a constitutional violation. The Court merely stated the evidence was sufficient to shock the conscience and never addressed any other factors.

Since the *Black* case, the Third Circuit has specifically adopted the Fourth Circuit's *en banc* opinion in this case. In *Metzger v. Osbeck,* 841 F.2d 518 (3rd Cir. 1988), the court cited the *en banc Justice* opinion and applied the *Johnson* factors and specifically included "whether the force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.* at 520.

The Third Circuit is consistent with the Fourth Circuit's opinion.

---

[2]Once it is shown the defendant intended to use force, the plaintiff is entitled, though not required, to prove that the defendant acted "maliciously and sadistically for ther very purpose of causing harm". *Johnson v. Glick* (citation omitted). That state of mind, Judge Friendly observed in *Johnson,* is among the "factors" that a court may consider to determine whether the conduct surpasses a common law battery and rises to the level of a constitutional tort.
Id. at 11, n. 1.

Fifth Circuit

The petitioner acknowledged the Fifth Circuit applies the *Johnson* factors. In *James v. Alfred,* 835 F.2d 605 (5th Cir. 1988), the Fifth Circuit found the permissive level of force is governed by the standard announced in *Whitley v. Albers,* 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). Although *Whitley* dealt with an eighth amendment claim, the court held that the standard for constitutionally excessive force which is beyond qualified immunity, required the same application of the *Johnson* factors.[3]

Sixth Circuit

The petitioner cites one case where the defendant did not claim error in the jury instructions and the Court found there was no plain error. *Waggoner v. Mosti,* 792 F.2d 595 (6th Cir. 1986).

The Sixth Circuit has consistently recognized and applied the *Johnson* factors including the malice and sadism factors.[4]

> The government's interest in effective law enforcement justifies the use of force to subdue and arrest suspects. If police officers were foreclosed from the use of force to effect the arrest of criminal suspects, it is doubtful that any suspect would peaceably submit to arrest. Thus, an officer's authority to apply force when necessary both deters criminals from resisting arrest and permits law enforcement officials to act efficiently in apprehending offenders.

Lewis v. Downs, 774 F.2d 711, 713 (6th Cir. 1985)

The Sixth Circuit decisions are consistent with the Fourth Circuit.

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[3]See also, *Coon v. Ledbetter,* 780 F.2d 1158 (5th Cir. 1986); *Ware v. Reed,* 709 F.2d 345 (5th Cir. 1983); *Shillingford v. Holmes,* 634 F.2d 263 (5th Cir. 1981).

[4]*Webb v. McCullough,* 828 F.2d 1151 (6th Cir. 1987); *Childs v. Pellegrin,* 822 F.2d 1382 (6th Cir. 1987); *Franklin v. Aycock,* 795 F.2d 1253 (6th Cir. 1986).

Seventh Circuit

In *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987), the Seventh Circuit rejected the *Johnson* factors in a fourth amendment case, but not a fifth amendment case such as this one. In *Lester, supra,* the Court specifically noted that the *Johnson* factors were still applicable to pretrial detainee (fifth amendment) cases and cited the *Justice v. Dennis* panel decision.

Even the Seventh Circuit would apply the *Johnson* factors to this case. The Fourth Circuit was aware of the *Lester* decision and refused to distinguish between fourth and fifth amendments when applying qualified immunity to the officer's actions.

Eighth Circuit

The petitioner cites *Davis v. Forrest*, 768 F.2d 257 (8th Cir. 1985) as indicative that the Eighth Circuit does not consider malice as a factor.

The *Davis* opinion specifically applied the four factors in *Johnson,* including malice. The court held that the terms "malice" and "shocks the conscience" are approved in the Eighth Circuit. It recognized those terms are intended to make clear that not every assault and battery by a police officer is a violation of the Constitution.[5]

Since the *Davis decision,* the *Johnson* factors have been upheld by the Eighth Circuit. *Dale v. Janklow*, 828 F.2d 481 (8th Cir. 1987); *Patzner v. Burkett*, 779 F.2d 1363 (8th Cir. 1985).

The Eighth Circuit is consistent with the Fourth Circuit.

---

[5]"Davis objects to the first part of the instruction, requiring that the conduct 'shock the conscience,' and to the fourth factor requiring the jury to consider whether the officer acted "maliciously and sadistically". Our court has on no less than three occasions approved the four factors, including the fourth factor to which Davis objects. (Citations omitted)."

Id. at 258

whether substantive due process rights were violated. The Ninth Circuit has applied those factors since 1975 to alleged procedural and substantive constitutional violations. Those factors distinguish between a tort or constitutional violation.[6]

The Ninth Circuit is consistent with the Fourth Circuit.

Tenth Circuit

The Tenth Circuit also applies the *Johnson* factors in cases involving alleged unconstitutionally excessive force. In *Trujillo v. Goodman,* 825 F.2d 1453 (10th Cir. 1987), the Tenth Circuit listed the four factors cited in *Johnson* as the appropriate standard. The constitutional prohibitions against excessive force apply to people in custody and people not yet in custody. *Wise v. Bravo,* 666 F.2d 1328 (10th Cir. 1981).[7]

After listing the *Johnson* factors, the Tenth Circuit stated:

Ninth Circuit

Contrary to the petitioner's argument, the Ninth Circuit applies the *Johnson* factors in excessive force cases to focus on the reasonableness of the officer's action. The Court applies the same factors in a fourth amendment or fourteenth amendment claim. *Smith v. City of Fontana,* 818 F.2d 1411, 1417 (9th Cir. 1987). In *Smith,* the Court specifically listed the *Johnson* factors as necessary to determine

[6]In *Rinker v. City of Napa,* 831 F.2d 829 (9th Cir. 1987), the Ninth Circuit held in light of *Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) and *Davidson v. Cannon,* 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), the jury instruction that lack of due care was sufficient to create liability under § 1983 was erroneous. The Court ordered a new trial with the jury instructed in accordance with *Johnson v. Glick.*

[7]Factors relevant to whether the use of force is excessive are the relationship between the amount of force used and the need presented, the extent of the injury inflicted, and the motives of the state officer. Force inspired by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience, or by malice rather than mere carelessness, may be redressed under § 1983. Such an inquiry is a factual one, depending for its resolution on the totality of the circumstances presented.

Trujillo at 1485.

> . . . . determining when a police officer's conduct violates a person's constitutional rights itself incorporates some intent requirement because it includes an inquiry into the motives of the State officer.

Id. at 1460

The Tenth Circuit is consistent with the Fourth Circuit.

Eleventh Circuit

The Eleventh Circuit also applies the *Johnson* factors in determining if force used was excessive and beyond the qualified privilege provided law enforcement. As the Eleventh Circuit stated in *Gilmere v. City of Alanta*, 774 F.2d 1495 (11th Cir. 1985) (*en banc*)[8],:

> The court below property cited the *Johnson* factors in addressing the plaintiff's substantive due process claim. The blows were not delivered in a good-faith effort to control but rather out of irritation at his initial resistance.

Id. at 1501

Excessive force cases which are alleged constitutional violations are treated the same in the Eleventh Circuit as in the Fourth Circuit.[9]

District of Columbia

Once again, the *Johnson* factors are applied in this circuit.

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[8]*Cert. denied,* ____ U.S. ____, 106 S.Ct. 1970, 90 L.Ed.2d 654 and *cert. denied sub nom. Sampson v. Gilmere,* ____ U.S. ____, 106 S.Ct. 1993, 90 L. Ed.2d 673 (1986).

[9]*See Popham v. City of Kennesaw*, 820 F.2d 1570 (11th Cir. 1987). *Burch v. Apalachee Community Mental Health Services*, 840 F.2d 797 (11th Cir. 1988).

> We regard *Rochin* as entirely consistent with the *Johnson v. Glick* guidelines for determining constitutional limitations on the use of force . . .
>
> . . . The application of force maliciously and sadisticallly, for the very purpose of causing harm, can serve no legitimate government purpose.

Norris v. District of Columbia, 737 F.2d 1148, 1151 (D.C. Cir. 1984); *Malhoyt v. Stover,* 830 F.2d 237 (D.C. Cir. 1987).

SUMMARY

There is not a direct conflict between the Fourth Circuit opinion and the other circuits. The petitioner is attempting to use this case as a vehicle to reduce § 1983 excessive force cases to simple negligence cases. The *Johnson* factors provide workable guidelines for juries to distinguish between a simple tort and a constitutional violation. Juries in the calm, security of the courtroom should not be allowed to second-guess law enforcement officers who are confronted with intoxicated, assaultive individuals. It is only when an officer punishes a citizen out of spite, ill will, or malice that he should be civilly liable. It is obvious the other circuits agree that those factors should be addressed by a jury. The petition should be denied.

II. THE INSTRUCTIONS ARE NOT VAGUE AND THIS ISSUE DOES NOT INVOLVE AN IMPORTANT FEDERAL QUESTION.

The petitioner contends that the use of the terms "shocks the conscience", "malice", or "sadism" are unconstitutionally vague and presents an important federal question.

The issue of the instructions being vague was not raised at the trial or appellate levels. It is being raised for the first time in this petition. Certiorari should not be granted for this reason.

Also, the terms "shocks the conscience", "malice", and "sadism" have been used by this Court and the circuit courts for many years. The general public understands their meaning and

can apply them as easily as the term "unreasonable". This issue does not raise a substantial federal question.

III. THE OPINION BELOW DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

The petitioner contends that the opinion below conflicts with this Court's decision concerning the fourth amendment, *Tennessee v. Garner,* 471 U.S. 1, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985)[10] or, in the alternative, this Court's substantive due process decisions concerning the fifth and fourteenth amendments. *Black v. Rutherford,* 468 U.S. 576, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984) and *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).[11] The respondent contends that the instructions violate no opinions of this Court. The instructions focus the jury on the issue of whether the officer, who was authorized to use force, exceeded the bounds permitted.

The instructions given by the trial court did not violate either *Tennessee v. Garner, Bell v. Wolfish,* or *Black v. Rutherford.* The *en banc* and the panel decision both found that the rights involved were fifth and not fourth amendment rights. (A-11, A-59, n.4). The fourth amendment and *Tennessee v. Garner* have no application. Even so, the reasonable standard for using force against a recalcitrant prisoner was used (A-13). What was "reasonable under the circumstances was defined as set forth in *Johnson v. Glick* (A-14).

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[10]It should be noted that the events of this case occurred on December 19, 1982. (A-3) Judgment for the respondent was entered March 7, 1985. (A-84) The *Garner* case was decided March 27, 1985. 471 U.S. 1.

[11]The petitioner's original complaint alleged only that the acts of the respondent "violated rights secured to the plaintiff by the Due Process Clause of the fourteenth amendment." See Complaint, Parg. 1. The first reference to the fourth amendment was on appeal although his request for jury instructions referred to "unreasonable" force (A-8 & 9). The issue of the fifth amendment was first raised in this petition.

Also, the fifth amendment proscriptions were not violated, since the instructions focused the jury's attention on whether the force used was necessary or for the "purpose of causing harm" (A-115). This is consistent with this Court's prior decision.

The petitioner asked for instructions which were a negligence standard of whether the respondent used "any force beyond that reasonably necessary to accomplish his lawful purpose." (A-9). He also advocates a standard of the least restrictive means available. Either standard will superimpose a "font of tort law" upon the federal courts.

Daniels v. Williams, supra.[12]

A decision of this Court specifically addressed this issue. *Whitley v. Albers, supra,* applied the same standard in an eighth amendment context. The lower court properly defined the standard of force whether fourth, fifth, eighth or fourteenth amendment applies, the jury was properly informed of the standard. Whether the force was needed was the focus of the instructions.

To hold that an officer is required to exercise a higher standard of restraint in use of force during a confrontation at or near the scene of the crime than he is at a jail merely because a magistrate has passed upon the issue of probable cause is inappropriate. The opposite is true. Outside the confines of the jail, where the officer confronts a person who may be armed, justifies, if anything, less restraint. Otherwise, for example, an

[12]This is not the case for deciding the question reserved in *Daniels v. Williams, supra.* 474 U.S. at 334, n.3, of whether "reckless" or "gross negligence" can be the basis of liability. The respondent's version of the occurrence (A-3 - A-6) does not involve "reckless" or "negligent" conduct. The petitioner's version differed sharply. He said that he was not drunk, with an alcohol concentration of 0.16, did not resist, was peacefully standing handcuffed when the respondent grabbed him by the throat. It was at this time that a bubble of spit flew from his mouth, floated through the air, landing on the respondent's face. At this time, respondent slammed his face into the wall, maced him while he cowered in the corner of the room, grabbed him in the groin, and threatened him. The jury rejected this version.

officer could not use mace on an arrestee who is struggling prior to taking him before a magistrate. He could, however, once the offender is searched, handcuffed, taken before the magistrate, and then to jail.

These instructions properly focused the attention of the jury on the difference between "privileged" and "non-privileged" force. They are consistent with this Court's opinions.

CONCLUSION

There is no significant conflict in circuits on this issue. The opinion of the lower court appropriately addressed this issue. This petition should be denied.

Respectfully submitted, this the 31st day of May, 1988.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day a copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was served upon the person indicated below by depositing a copy of same in the United States mail, first class postage prepaid, addressed as follows:

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This the 31st day of May, 1988.

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